



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

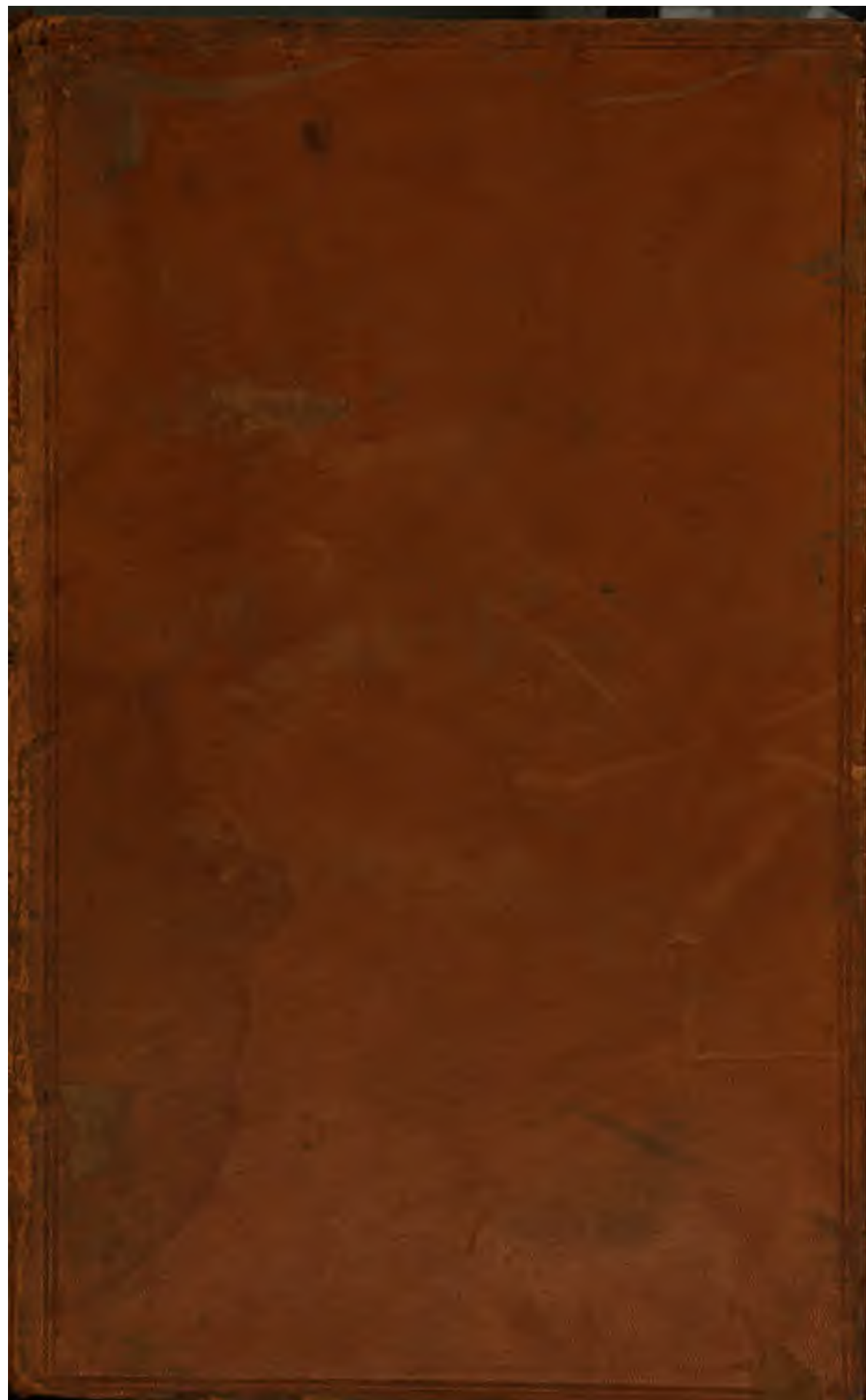
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

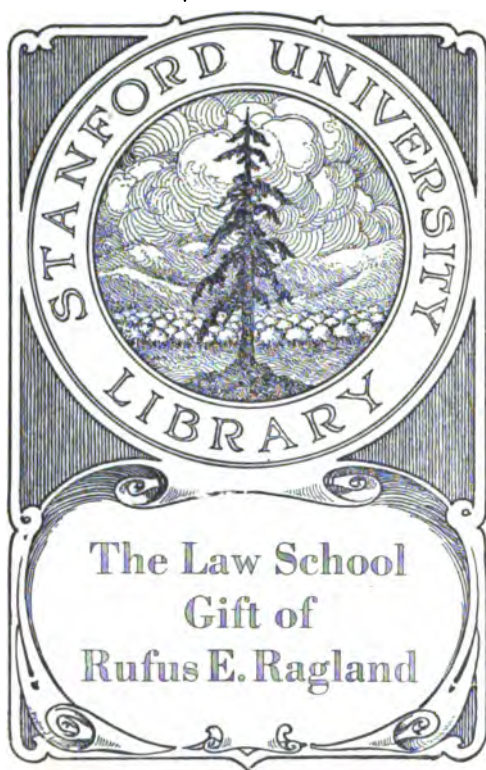
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

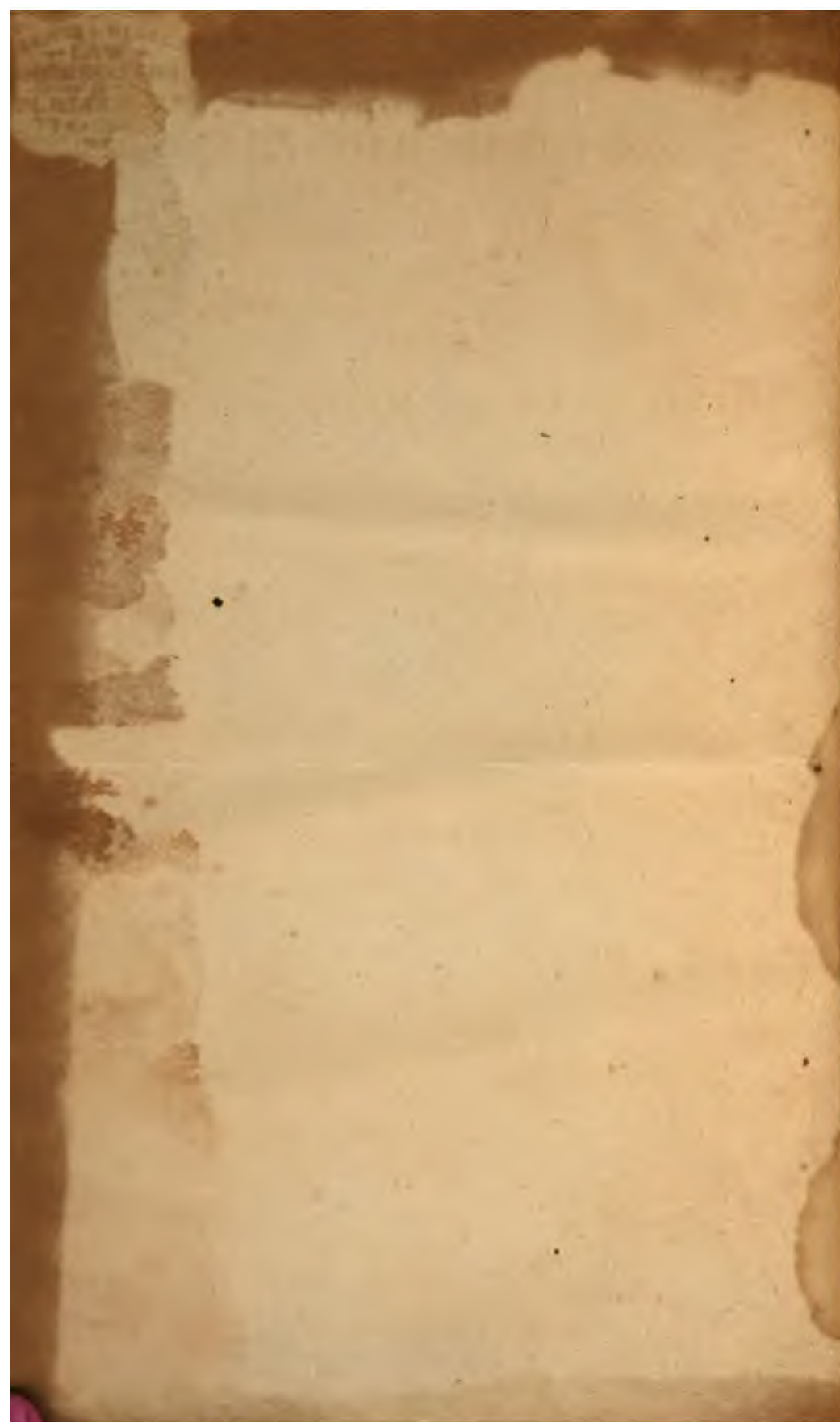
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

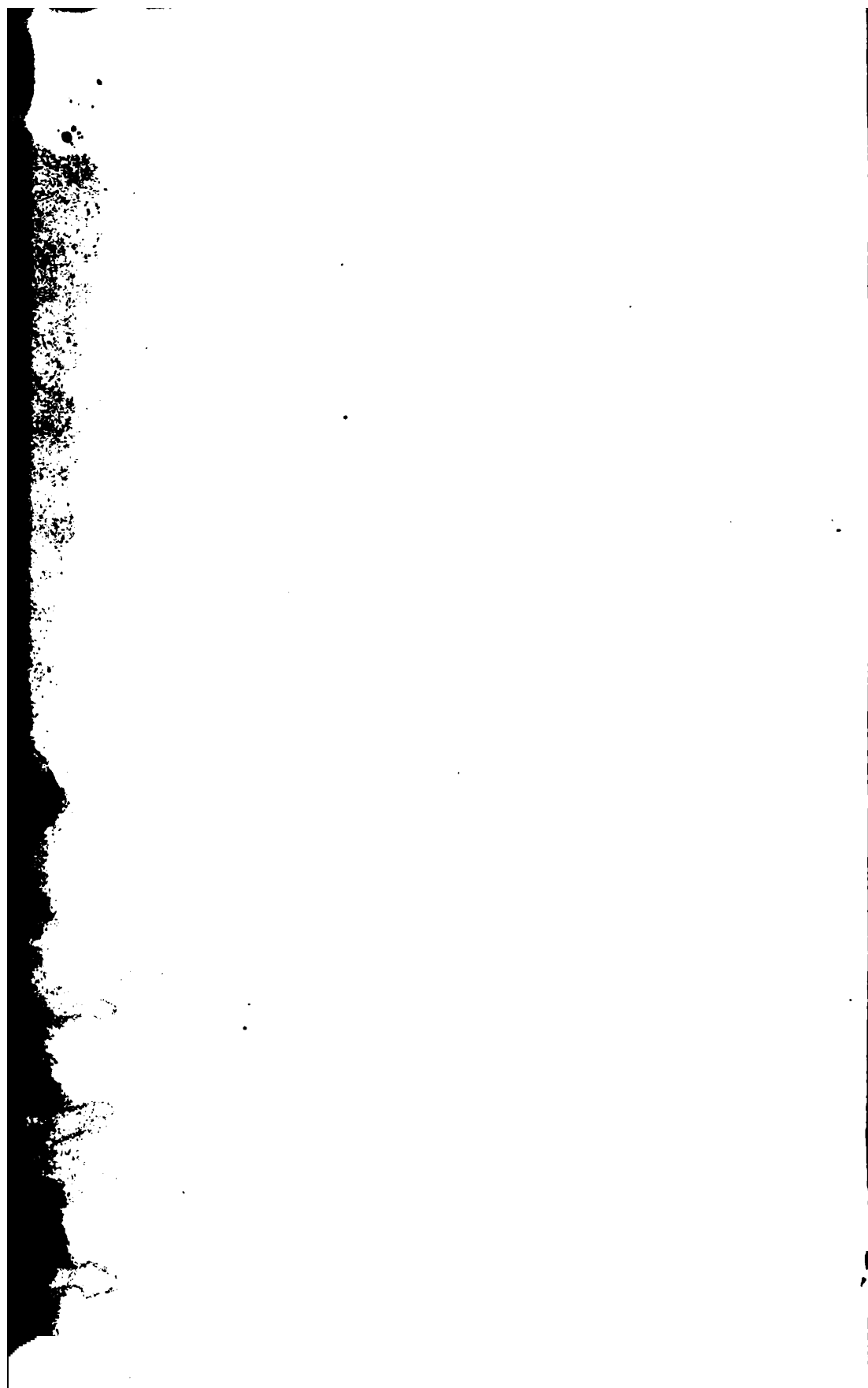


LOOD.
LERS
HERS
AUS









John Reynolds.
San Francisco
ENGLISH REPORTS 1852

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

EDITED BY

EDMUND H. BENNETT & CHAUNCEY SMITH, ESQRS.,

COUNSELLORS AT LAW.

VOLUME VI.

Containing Cases in the Courts of Equity and Common Law, and in the Ecclesiastical Courts, during the year 1851.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

1852.

[Handwritten scribbles]

Entered according to Act of Congress, in the year 1851, by
LITTLE AND BROWN,
In the Clerk's Office of the District Court of the District of Massachusetts.

L 1313
APR 7 1930

[Faint mirrored text from reverse side]

STEREOTYPED AT THE
BOSTON STEREOTYPE FOUNDRY.

CAMBRIDGE:
PRINTED BY HOUGHTON AND HAYWOOD.

JUDGES OF THE SEVERAL COURTS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

THE HIGH COURT OF CHANCERY.

Right Hon. Lord TRURO, Lord High Chancellor.
Right Hon. Sir JOHN ROMILLY, Master of the Rolls.
Right Hon. Lord CRANWORTH, Vice Chancellor of England.
Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., }
Right Hon. Sir GEORGE JAMES TURNER, Knt., } Vice Chancellors.

QUEEN'S BENCH.

Right Hon. Lord CAMPBELL, Lord Chief Justice.
Sir JOHN PATTESON, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.

COMMON PLEAS.

Right Hon. Sir JOHN JERVIS, Knt., Lord Chief Justice.
Sir WILLIAM HENRY MAULE, Knt.
Sir CRESSWELL CRESSWELL, Knt.
Sir EDWARD VAUGHAN WILLIAMS, Knt.
Sir THOMAS NOON TALFOURD, Knt.

EXCHEQUER.

Right Hon. Sir FREDERICK POLLOCK, Knt., Lord Chief Baron.

Right Hon. Sir JAMES PARKE, Knt.

Sir EDWARD HALL ALDERSON, Knt.

Sir THOMAS JOSHUA PLATT, Knt.

Sir SAMUEL MARTIN, Knt.

COURT OF CRIMINAL APPEAL.

THE FIFTEEN JUDGES OF THE QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER.

BANKRUPTCY.

Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., Vice Chancellor.

COURT OF ARCHES AND PREROGATIVE COURT.

Right Hon. Sir HERBERT JENNER FUST.

CONSISTORY COURT AND ADMIRALTY COURT.

Right Hon. STEPHEN LUSHINGTON, D. C. L.

Sir A. J. E. COCKBURN, Knt., Attorney General.

Sir WILLIAM PAGE WOOD, Knt., Solicitor General.

Sir JOHN DODSON, D. C. L., Queen's Advocate General.

JOSEPH PHILLIMORE, D. C. L., Admiralty Advocate.

NAMES OF THE REPORTERS;

1851.

HOUSE OF LORDS.

A. GORDON, Esq.

W. H. BENNET, Esq.

TENISON EDWARDS, Esq.

PRIVY COUNCIL.

CHARLES MARETT, Esq.

TENISON EDWARDS, Esq.

COURTS OF CHANCERY.

EDWARD COOKE, Esq.

TENISON EDWARDS, Esq.

THOMAS PARKER, Jun., Esq.

G. Y. ROBSON, Esq.

THOMAS WYATT GUNNING, Esq.

A. GORDON, Esq.

BENEDICT LAWRENCE CHAPMAN, Esq.

FRANCIS FISHER, Esq.

CHARLES MARETT, Esq.

JOHN FITZPATRICK VILLIERS, Esq.

W. W. COOPER, Esq.

QUEEN'S BENCH AND BAIL COURT.

G. J. P. SMITH, Esq.

HENRY JOHN HODGSON, Esq.

W. B. BRETT, Esq.

GEORGE FRANCIS, Esq.

COLLEY HARMAN SCOTLAND, Esq.

HENRY MACNAMARA, Esq.

FRANCIS RUSSELL, Esq.

H. PELLY, HINDE, Esq.

COMMON PLEAS.

ALEXANDER JAMES JOHNSTON, Esq.	W. PATERSON, Esq.
HON. GEORGE DENMAN.	J. R. BULWER, Esq.

EXCHEQUER AND EXCHEQUER CHAMBER.

HENRY HORN, Esq.	W. M. BEST, Esq.
EDWARD WISE, Esq.	HENRY MACNAMARA, Esq.
ROBERT R. PEARCE, Esq.	GEORGE FRANCIS, Esq.

COURT OF CRIMINAL APPEAL.

FRANCIS RUSSELL, Esq.	ROBERT R. PEARCE, Esq.
-----------------------	------------------------

COURT OF BANKRUPTCY.

W. W. COOPER, Esq.	BENEDICT LAWRENCE CHAPMAN, Esq.
--------------------	---------------------------------

ECCLESIASTICAL COURTS.

J. P. DEANE, D. C. L., of Doctors' Commons.

HIGH COURT OF ADMIRALTY.

J. P. DEANE, D. C. L., of Doctors' Commons.

A

T A B L E

OF THE

ONE HUNDRED AND FIFTY-FIVE CASES

CONTAINED IN

VOLUME VI.

Hereafter will be published an Index of these Cases, containing a reference to the volume and page of this, and every other series of Reports, where the same case may be found.

	PAGE
Abley v. Dale,	422
(County Courts Act, 9 & 10 Vict. c. 95, s. 98, 99 — Unsatisfied Judgment — Discharge by Insolvent Court — Jurisdiction of County Court Judge.)	
Adcock v. Wood,	570
(Arbitration — <i>Nul tiel Agard</i> — Matters in Difference — Payment to a third Party.)	
Aldis v. Mason,	391
(Pleading — Traverse — Too large.)	
Alhusen v. Prest & another,	576
(Pleading — Bankruptcy — Withdrawal of Summons, Meaning of.)	
Allfrey v. Allfrey,	39
(Impertinence.)	
Anderton v. Yates,	45
(Notes of Counsel — Time for filing Affidavits.)	
Armistead v. White,	349
(Liability of Innkeeper — Negligence of Plaintiff.)	
Attorney General v. Metcalfe & another,	456
(Legacy Duty — Discretion of Trustees to sell — Payment and Satisfaction of Legacy.)	
Barber, <i>in re</i> ,	338
(Attorney — Misconduct — Renewal of Certificate.)	

Beldon <i>v.</i> Campbell,	473
(Ship and Shipping — Master, Authority of, to pledge Credit of Owner.)	
Beman <i>v.</i> Rufford,	106
(Railway Company — Injunction.)	
Biddulph <i>v.</i> Chamberlayne,	347
(Libel — Plea of Justification — Material Part.)	
Billing, <i>in re</i> ,	10
(Taxation.)	
Blackmore, <i>in re</i> ,	10
(Taxation.)	
Bluck <i>v.</i> Gompertz,	524
(Evidence Act, 14 & 15 Vict. c. 99, s. 6 — Inspection and Copy of Documents.)	
Bowes, <i>ex parte</i> ,	137
(Companies Clauses Consolidation Act, 1845 — Bond Creditor — Equitable Lien — Receiver — Practice.)	
Brighton, Lewes, and Tonbridge Wells Railway Company, <i>in re</i> ,	101
(Joint-stock Companies Winding-up Acts.)	
Brown <i>v.</i> Clegg,	334
(Local Improvement Act — Construction.)	
Brown <i>v.</i> Collyer,	239
(Arbitration — Power of the Court to enlarge the Time for making an Award — 3 & 4 Will. 4, c. 42, s. 39.)	
Brown <i>v.</i> Nicholls,	599
(Practice — Administration <i>de Bonis</i> with Will annexed — Substituted Legatee for Life — Substituted Legatee.)	
Brunswick and Laneburgh, <i>ex parte</i> ,	579
(Scire Facias — Recognizance — Fiat of Attorney General.)	
Burnett <i>v.</i> Phillips,	467
(Outlawry — Judgment of Waiver — Variance.)	
Butterwick Free School, <i>in re</i> ,	104
(Charity — Petition under Sir Samuel Romilly's Act — Motion — Attorney General.)	
Carmichael <i>v.</i> Hughes,	71
(Infant — Past Maintenance.)	
Carne & Vivian <i>v.</i> Malins & others,	568
(Amendment — Adding Plaintiffs — Limitations, Statute of.)	
Carwardine <i>v.</i> Wislade,	103
(Practice — Claim — Writ of Summons — Service — Stat. 4 & 5 Will. 4, c. 82.)	
Cawley, Appellant; Furnell & another, Respondents,	397
(County Court Appeal — Determination in Point of Law — In what Cases Appeal lies — Nature and Practice of Court of Appeal — Statute of Limitations, Acknowledgment to defeat.)	

TABLE OF CASES.

ix

Chichester v. Hall & another,	340
(Copyhold — Heriot — Quitrent — Statute of Limitations — Presumption.)	
Clay, Appellant; Crofts, Respondent,	485
(Stamp — 55 Geo. 3, c. 184, Sched. Part 1 — "Agreement — Prospectus — Proposal.")	
Clearson v. Teague,	586
(Will — Codicil — Probate — Revocation — Proof of Fraud.)	
Collett v. The London and North-western Railway Company,	305
(Railway Company, Liability of — Carriage of Mails and Officers of Post Office — Duty of Company — 1 & 2 Vict. c. 98 — Personal Injury to Officer.)	
Cook, <i>in re</i> ,	47
(Guardian — Infant — Mother.)	
Cort & another v. The Ambergate, Nottingham, Boston, and Eastern Junction Railway Company,	230
(Contract for the Sale of Goods — Damages for Non-acceptance — Measure of Damages.)	
Cóyle v. Alleyne,	64
(Practice — Exceptions — Injunction, Bill for — Setting down Exceptions.)	
Cross v. Cheshire,	517
(Partners — Money paid — Affidavit in the Isle of Man.)	
Croxton, <i>ex parte</i> ,	93
(Joint-stock Companies Winding-up Acts — Contributory.)	
Cutler's Trust, <i>in re</i> ,	97
(Settlement on Wife.)	
Davies v. Edwards,	520
(Statute of Limitations — 9 Geo. 4, c. 14 — Part Payment — Insolvency.)	
Day v. Croft,	62
(Receiver — Parties numerous — Decree — Subsequent Proceedings — Attendances.)	
Dendy, <i>in the Goods of</i> ,	584
(1 Vict. c. 26, s. 20, 22 — Revocation — Revival.)	
Doe d. Badeley v. Massey,	355
(Statute of Limitation — Ejectment — Person claiming under Mortgage — User.)	
Doe d. Bourne v. Burton,	325
(Ejectment — Agreement — Acknowledgment of Plaintiff's Title.)	
Doe v. Challis,	249
(Ejectment — Action for mesne Profits — Consent Rule — Estoppel.)	
Doe d. Davies v. Davies,	301
(Will, Construction of — Conditional Devise.)	
Doe d. Davies v. Thomas,	487
(Landlord and Tenant — Tenancy at Will — Insolvency — Vesting Order — Notice.)	

Doe d. Hopkinson & others v. Ferrand,	404
(Power — Lease — Fine or Foregift — Waste — Covenant — Exception — License by Implication — Stat. Marlbridge, 52 Hen. 3, c. 23.)	
Doe d. Hudson v. The Leeds and Bradford Railway Company,	283
(Railway Company — Right to take Land — Possession — Ejectment.)	
Doe d. Page v. Page,	346
(Will — Construction of — Word "Business.")	
Doe d. Palmer v. Eyre,	355
(Statute of Limitations — Ejectment — Person claiming under Mortgage — User.)	
Doe d. Shallcross v. Palmer & others,	155
(Will — Interlineation — When presumed to be made — Evidence to rebut Presumption — Previous Declarations of Testator — Admissibility.)	
Early v. Middleton,	86
(Will — Construction of.)	
Ellis v. Regina,	438
(Bond to the Crown — Power of Disposition — Exercise of Power — Record.)	
Foster, Executor of Clark, v. Dawber,	496
(Promissory Note — Payment, Evidence of — Discharge, Evidence of — Bill of Exchange, Discharge from, by Parol — Statute of Limitations — Acknowledgment — Promise.)	
Fynney v. Beasley,	186
(Witness — 1 Will. 4, c. 22, s. 4 — Order for Examination of — Time of making.)	
Gabriel v. Smith,	172
(Sale of Real Estate — Construction of Conditions of Sale — Covenant to Produce — Deeds not in Vendor's Possession.)	
Gardner v. Perry,	119
(Settlement — Portions — Interest.)	
Gedy, <i>in re</i>,	53
(Solicitor — Taxation — Costs — Signed Bill — Responsibility — Client — Agent.)	
Glyn v. Caulfield,	1
(Production — Privilege — Partnership — Parties.)	
Godmanchester Grammar School, <i>in re</i>,	46
(Stat. 3 & 4 Vict. c. 77 — Sir Samuel Romilly's Act — Attorney General's Certificate — Jurisdiction.)	
Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company,	132
(Railway Company — Misapplication of Capital — Injunction — Acquies- cence.)	
Grantham Canal Company v. The Ambergate, Nottingham, and Boston and Eastern Junction Railway Company,	328
(Railways — Stat. 9 & 10 Vict. c. 155, s. 78 — "Between," Meaning of — <i>Mandamus</i> .)	

TABLE OF CASES.

xi

Grove <i>v.</i> Young,	38
(Heir at Law — " <i>Deiavit vel non.</i> ")	
Hall's Charity, <i>in re</i> ,	150
(Construction of Charity Deed — Jurisdiction under Sir Samuel Romilly's Act.)	
Hancock <i>v.</i> Reede. — Same & Moore <i>v.</i> Same,	368
(Award — Effect of Agreement to refer — Finality — Sufficiency of Affidavits.)	
Hare <i>v.</i> Fleay,	433
(Arbitration — 1 & 2 Vict. c. 110, s. 18 — Practice — Motion to enforce Award.)	
Hart <i>v.</i> Baxendale & others,	468
(Carrier, Liability of — Notice — 1 Will. 4, c. 68 — Place of receiving Goods.)	
Hibblethwaite <i>v.</i> The Leeds and Thirsk Railway Company,	523
(Practice — Change of Defendant's Name — Affidavit.)	
Hirschel, <i>ex parte</i> ,	101
(Joint-stock Companies Winding-up Acts.)	
Hough's Estate, <i>in re</i> ,	61
(Will — Construction — Revocation.)	
Houghton <i>v.</i> Barnett,	131
(Answer — Insufficiency.)	
Humphrey <i>v.</i> Humphrey,	113
(Legacy — Bequest of Interest.)	
Hutchins <i>v.</i> Hutchins,	91
(Breach of Trust — Rate of Interest — Accounts — Rests.)	
Imperial Bank of England, <i>in re</i> ,	50
(Costs — Joint-stock Companies Winding-up Acts.)	
James, <i>ex parte</i> ,	95
(Joint-stock Companies Winding-up Acts — Provisional Committee-man — Authority.)	
Jonas, Appellant; Adams, Respondent,	188
(County Court — Improper Reception of Evidence — Appeal in a Jury Case — Granting new Trial — Judgment for Defendant.)	
Jones <i>v.</i> Davies & others,	566
(Trove — Pleading — Not Guilty — Denial of Property.)	
King <i>v.</i> The Rochdale Canal Company,	241
(Stat. 34 Geo. 3, c. 78, s. 113 — Violation of Act — Allegation of Damage unnecessary — Special Damage presumed after Verdict — Jurisdiction of Superior Courts.)	
Kirk <i>v.</i> Unwin & another,	477
(Arbitration — Award — Enlargement of Time — Name of Arbitrator — Uncertainty — Costs.)	

Kirkpatrick's Trust, <i>in re</i> ,	152
(Order of Reference — <i>Ex parte</i> Proceedings — Investment of Funds — Parties interested.)	
Knaggs v. Knaggs,	238
(Pleading — Joinder of Issue — <i>Similiter</i> .)	
Lambert v. Smith,	394
(Insolvent Act, 1 & 2 Vict. c. 110, s. 69, 75 — Discharge — Schedule.)	
Leech v. Clabburn,	581
(Appearance <i>sec. stat.</i> — Infant.)	
Lemann v. Lemann,	598
(1 Vict. c. 26, s. 9 — Foot or End.)	
Levinson v. Syer,	353
(Warrant of Attorney — Attesting Witness — 1 & 2 Vict. c. 110, s. 9.)	
Lock v. De Burgh,	65
(Rents — Apportionment.)	
Longmeid & Wife v. Holliday,	562
(Case — Breach of Warranty — Action, by whom maintainable.)	
Lowe v. Carpenter,	450
(2 & 3 Will. 4, c. 71 — Right of Way — Pleading.)	
Lowndes's Trust, <i>in re</i> ,	60
(Payment of Dividends — Estate for Life — Prospective Order — Evidence.)	
Marson & another v. Lund,	319
(<i>Scire Facias</i> — Stat. 7 & 8 Vict. c. 110 — Pleading.)	
Massey v. Goodall,	326
(<i>Assumpsit</i> — Pleading — Necessary Allegations.)	
Master Warden, Assistants, and Fellowship of the Company of Tobacco-pipe Makers v. Loder,	309
(Limitations, Statute of — 21 Jac. 1, c. 16, s. 3 — Debt for Penalty under a By-law.)	
Matthews v. Pincomb,	70
(Common Claims — Special Claim — Legacy and Interest.)	
Milner, <i>ex parte</i> ; <i>in re</i> Milner v. Rhoden,	371
(<i>Mandamus</i> to the Judge of a County Court to hear and determine a Plaintiff.)	
Morgan v. Morgan,	130
(Accumulation — <i>Thellusson Act</i> — Tenant for Life.)	
Morison v. Moat,	14
(Injunction — Secret of compounding Medicines.)	
Moseley v. Hide,	247
(Sale of Estate — Conditions — Power to convey — Right to recover a Deposit.)	

TABLE OF CASES.

xiii

Newton v. The Grand Junction Railway Company,	557
(Patent — Combination of Things new and old — Imitation.)	
North London Junction Railway Company, <i>in re</i> ,	95
(Joint-stock Companies Winding-up Acts — Provisional Committee-man — Authority.)	
Oundle Union Brewery Company, <i>in re</i> ,	98
(Joint-stock Companies Winding-up Acts — Contributory.)	
Parlby v. Parlby,	593
(Pleading — Evidence — Absence of Witness.)	
Pawsey v. Barnes,	66
(Claim — Statute of Limitations — Produce of Real Estate directed to be sold — Stale Demands.)	
Pears v. Wilson,	445
(County Court — Jurisdiction — Legacy — Record — Prohibition.)	
Peters v. Beer,	63
(Examination of Witnesses — Commissioners — Fees — Depositions — Lien.)	
Philps v. Evans,	37
(Will — Construction — "Personal Representative" — "Next of Kin.")	
Plasterers Company v. The Parish Clerks Company,	481
(Easement — Light — Enjoyment for Twenty Years — Parol Agreement — Payment of Rent for Lights.)	
Rackham v. Cooper,	68
(Claims — Practice — Affidavit of Service — Non-appearance of Plaintiff.)	
Reece, <i>ex parte</i> ,	6
(Judgment — Charging Order — Stop Order against Payment of Dividends.)	
Regina v. Aldham and the United Parishes Insurance Society,	365
(Friendly Society — Notice of Meeting — Requisition upon Officers.)	
Regina v. The Ambergate, Nottingham, and Boston and Eastern Junction Railway Company,	328
(Railways — Stat. 9 & 10 Vict. c. 155, s. 73 — "Between," Meaning of — <i>Mandamus</i> .)	
Regina v. Caudwell,	352
(Practice — Motion for a New Trial in a Criminal Case — Presence of Defendant in Court.)	
Regina v. The Dean and Chapter of Rochester,	269
(Mandamus — Grammar School — Removal of Master — Visitor — Disqualification — Excess of Jurisdiction.)	
Regina v. The Guardians of the Poor of Oxford,	196
(Master of Workhouse, Appointment of — 11 Geo. 3, c. 14, s. 27 — Vacancy.)	
Regina v. Haslam & another,	321
(Poor Rates — Fixtures — Mechanical Apparatus.)	
Regina v. Hellier,	253
(Conviction — Appeal — Order to pay Costs — Acquiescence — Removal by <i>Certiorari</i> .)	

<i>Regina v. Isaacs</i> ,	185
(Practice — <i>Habeas Corpus</i> to bring Prisoner before Justices — Charge of Felony — Application at Chambers.)	
<i>Regina v. The Justices of Middlesex</i> ,	267
(Costs of <i>Mandamus</i> to Sessions.)	
<i>Regina v. The Lancashire and Yorkshire Railway Company</i> ,	259
(Railway Company — Duty to complete Road — <i>Mandamus</i> .)	
<i>Regina v. The London and North-western Railway Company</i> ,	220
(Railway Company — Compulsory Purchase of Land — <i>Mandamus</i> — Return.)	
<i>Regina v. Parkinson</i> ,	352
(Practice — Motion for a New Trial in a Criminal Case — Presence of Defendant in Court.)	
<i>Regina v. The Poor-law Commissioners</i> ,	189
(Poor Laws — Appointment of Officers — Regulation of Workhouse — Rescinding Regulations — Quashing Order.)	
<i>Regina v. The South-eastern Railway Company</i> ,	214
(Railway Company — Right to cross Turnpike — Option of the Company as to the Manner of Crossing.)	
<i>Regina v. Wilson</i> ,	209
(Maintenance of Pauper — Order of Justices — Appeal.)	
<i>Regina v. The York, Newcastle, and Berwick Railway Company</i> ,	259
(Railway Company — Duty to complete Road — <i>Mandamus</i> .)	
<i>Richardson v. The South-eastern Railway Company</i> ,	426
(Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18 — Compensation — Jury — Costs — Sects. 38 and 51 incorporated in Sect. 68.)	
<i>Ring v. Jarman</i> ,	154
(Pleading — Parties — Next of Kin.)	
<i>Robinson & Wife v. Bristol</i> ,	377
(Adowson — <i>Quare Impedit</i> — United Churches — Act of Union, Effect of — Words of Description in Deed — Disseizin by Usurpation — 7 Ann. c. 18.)	
<i>Rowley v. Adams</i> ,	124
(Trustee — 13 & 14 Vict. c. 60 — Copyholds — Decree for Sale — Legal Estate — Refusal to surrender — Vesting Order — <i>Feme Covert</i> .)	
<i>Royal Bank of Australia, in re</i> ,	51
(Joint-stock Companies Winding-up Acts — Documents — Creditors — Inspection.)	
<i>Russell v. The East Anglian Railway Company</i> ,	137
(Companies Clauses Consolidation Act, 1845 — Bond Creditors — Equitable Lien — Receiver — Practice.)	
<i>Russell's Estate, in re</i> ,	65
(Infants — Guardian — Petition — Next Friend.)	
<i>Savory, in the Goods of</i> ,	583
(1 Vict. c. 26, s. 9 — Execution by Testator's Initials.)	

TABLE OF CASES.

xv

Scott v. De Richebourg,	374
(Practice — Set-off of Costs — Attorney's Lien — 33d Reg. Gen. H. T., 2 Will. 4.)	
Sellers v. Dickinson,	544
(Patent — New Combination — Specification — Infringement.)	
Shardlow v. Gaze,	69
(Claims — Evidence — Plaintiff's Affidavit.)	
Simpson's Settlement, <i>in the Matter of</i> ,	58
(Power — Default of Appointment — Joint and separate Powers of Ap- pointment.)	
Sivewright v. Archibald,	286
(Broker's Law — Entry of Contract — Bought and sold Notes — Variance between them — Statute of Frauds — Memorandum.)	
Smith v. Cartwright,	528
(Custom to measure Coals — Right to weigh Coals by Statute — Coal- meter Officer not Servant of Corporation — Validity of Appointment not under Seal.)	
Smith v. Howell,	490
(Covenant to indemnify — Rent — Repairs — Costs — Judgment by Default — Time of Liability accruing.)	
Spike, <i>in re</i> ,	10
(Taxation.)	
Stainbank & others v. Fenning,	412
(Ship and Shipping — Master — Hypothecation — Form of Instrument — Maritime Risk — Insurable Interest — Loan.)	
Steiner v. Heald & others,	536
(Patent — New Manufacture — Garancine — Fresh and spent Madder.)	
Sunderland, The, Marine Insurance Company v. Kearney & another,	312
(Policy of Insurance — Deed Poll — Absolute Covenant — Liability of Incorporated Company — Averment of sufficient Funds — Action of Debt — Joinder of Plaintiffs.)	
Symons v. May,	541
(Insolvent Act, (India,) 11 Vict. c. 21, s. 6 — Schedule — Bills, Description of — Sufficiency of.)	
Tipping v. Howard,	99
("Legal Representatives" — Construction.)	
Tobacco-pipe Makers v. Loder,	309
(Limitations, Statute of — 21 Jac. 1, c. 16, s. 3 — Debt for Penalty under a By-law.)	
Trye v. The Corporation of Gloucester,	73
(Mortmain.)	
Turner & others, Assignees, v. The Trustees of the Liverpool Docks,	507
(Stoppage <i>in Transitu</i> — Bill of Lading making Cargo deliverable to Consignor's Order — Delivery on board Consignor's Vessel — Pleading — Not possessed.)	

United Parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, <i>in re</i> ,	189
(Poor Laws — Appointment of Officers — Regulations of Workhouse — Re- scinding Regulation — Quashing Order.)	
Valpy <i>v.</i> Oakeley,	168
(Contract — Damages, Measure of — Non-delivery of Goods — Payment by Bill afterwards dishonored — Bankrupt.)	
Vestry-men of St. James, Westminster, <i>in re</i> ,	189
(Poor Laws — Appointment of Officers — Regulations of Workhouse — Re- scinding Regulations — Quashing Order.)	
Walker, <i>ex parte</i> ,	51
(Joint-stock Companies Winding-up Acts — Documents — Creditors — In- spection.)	
Walworth <i>v.</i> Holt,	50
(Costs — Joint-stock Companies Winding-up Acts.)	
Watkins <i>v.</i> The Great Northern Railway Company,	179
(Railway Company — Construction of Railways Clauses Act, 8 & 9 Vict. c. 20, s. 55 — Obstruction of Right of Way — Action in Respect of special Damage only.)	
Watts <i>v.</i> Jefferyes,	6
(Judgment — Charging Order — Stop Order against Payment of Dividends.)	
Whitfield <i>v.</i> Parfitt,	48
(Ship Registry Acts — Bill of Sale — Mortgage — Indorsement — Redemp- tion — Costs.)	
Zulueta <i>v.</i> Vinent,	122
(Injunction — Revival — Common Order — Amended Bill — Affidavit.)	

CASES
ARGUED AND DETERMINED
IN THE
COURTS OF CHANCERY;

DURING THE YEAR 1851.

GLYN v. CAULFIELD.¹

August 5, 1851.

Production — Privilege — Partnership — Parties.

A trading company having become embarrassed, appointed three of its members, A, B, and C, to act as a committee for the shareholders in winding up its affairs, and they were empowered to send out agents to India for that purpose; and they were empowered by the directors to manage and arrange the affairs of the company. They appointed D. and E. agents to go to India.

The plaintiffs brought several actions on certain debentures against A, B, and C, as shareholders. A, B, and C. filed a bill for an injunction, and to have the debentures delivered up. The present plaintiffs then filed a bill against A, B, and C. for discovery. A, B, and C, in their answers, admitted the possession of certain documents, consisting of communications which passed between them and the directors, the secretary of the company, and the agents in India, and which were alleged to be confidential communications after the matters in question in this suit had arisen, and in contemplation of, or pending, proceedings in respect of various matters, and in particular of the claims of the plaintiffs, and for the purpose of communicating to the persons to whom they were addressed the proceedings adopted in respect of such claims, and the opinions of the legal advisers consulted by the defendants, or for the purpose of being submitted to such legal advisers and the shareholders; and they claimed protection from production:—

Held, first, overruling the objection that the defendants had the possession of the documents only as the agents of the directors and shareholders, and that they were not parties to the suit, and were not willing that the documents should be produced, that the defendants sufficiently represent the whole of the partners or shareholders for all the purposes of the suit:—

Secondly, affirming the order of Knight Bruce, V. C., for production, that the documents were not privileged, with the exception of such parts thereof as contained the opinions of the legal advisers, it being no ground of privilege that they relate to the matters in dispute, and arose out of communications between the parties themselves, with a view to their defence in the suit.

THIS was an appeal from an order of Knight Bruce, V. C. The facts of this case are fully stated by the lord chancellor in his judg-

¹ 15 Jur. 807.

dules. The actual possession required to be produced on is claimed for these with the possession privilege.

regards the possession, the elements enumerated in the half of the directors and its are; that none of the many of the shareholders are not authorized, and the to the suit, object to the allege that they hold the rule as the agents and on ties to the deed of the 10th parties to the suit; and that the production of these on to the production upon the documents who are not at the defendants sufficiently shareholders for all the purposes question of privilege, these the defendants. The opinion variance with any of the authorities those cases are fully considered.

61, the documents were not in but were in the possession of the made, that solicitor being deemed party to the suit, and other parties proposed the production. The order in the principle that the court has a whatever access the defendant himself his decision was affirmed by the lord in *Murray v. Walter*, Cr. & Ph. 114, that there must be some peculiarity in by, which does not appear in the report, defendant to produce the documents in the of a partnership, who was the agent of other partners in such partnership. He was not to order a defendant to produce agent for the defendant and others; and he (a ground of that decision,) "When documentation of A., B., and C., you cannot order that, and that for the best possible reason, namely, produce them." In *Reid v. Langlois*, 1 Mac. & G. 7, one partner was protected from producing to the partnership, though in his own actual that case the other partner, not before the court, had a distinct interest. The suit related to a defendant alleged to belong to himself alone, whereas

Glyn v. Gaulfield.

ment; and the chief cases cited in the course of the arguments are also referred to by his lordship.

Roundell Palmer and *Cotton*, in support of the appeal.

Roll and Selwyn, contra.

LORD CHANCELLOR. This is an appeal against an order of Knight Bruce, V. C., directing the defendants to produce for inspection certain documents and papers admitted by the defendants, in their answer, to be in their possession. The facts of this case, so far as they are material for the purpose of the present appeal, are these: A partnership or company was formed by a considerable number of persons, called "The Bengal Indigo Company." The defendants Elliott and Wilson are shareholders in that company. The defendant Brownrigg was a shareholder, but he ceased to be so. The partnership or company became embarrassed, and the three defendants were appointed a committee to act for the body of shareholders in settling the claims against the company, and to coöperate with the directors in winding up its affairs. By an indenture of the 10th of May, 1848, the same defendants were empowered to send out agents to India for accomplishing the purposes above mentioned. By a power of attorney, in August, 1848, the same defendants were empowered, by the directors of the company, to manage and arrange the affairs of the company in London. In pursuance of the indenture of the 10th of May, 1848, they appointed W. B. Elliott and H. W. Crawford to proceed to India as agents.

The plaintiffs have commenced three actions upon certain instruments, designated debentures, issued by the company. The first action was against the defendants Elliott and Brownrigg; the second against the defendants Wilson and Brownrigg; and the third against the defendants Caulfield and Brownrigg. These actions are against the several defendants as shareholders or partners in the company. The defendants, on behalf of themselves and the other shareholders, filed a bill in this court against the plaintiffs for discovery and relief, praying an injunction against proceedings in the action at law, and that the plaintiffs might be decreed to deliver up the debentures upon which the actions were brought. The now plaintiffs, in aid of their actions and of their defence to the bill so filed against them, have filed the present bill of discovery, to which the defendants Elliott and Wilson put in a joint answer, and the defendant Brownrigg a separate answer; and by their answers they allege that the debentures were deposited with Messrs. Cockerell & Co., to enable them to raise money for the purposes of the company, but Messrs. Cockerell & Co. deposited the debentures with the plaintiffs in violation of their duty, as security for advances made to them for their own purposes. An order having been made in this cause by Knight Bruce, V. C., for the production of certain documents specified in the schedules to the answers, the defendants Elliott, Wilson, and Brownrigg have appealed against such order, so far as it relates to docu-

Glyn v. Canfield.

ments specified in the second and third schedules. The actual possession by the defendants of the documents required to be produced is admitted; but exemption from production is claimed for these documents, first, for certain reasons connected with the possession thereof; and, secondly, on the ground of privilege.

With respect to the first ground, which regards the possession, the defendants allege that they hold the documents enumerated in the second schedule as the agents and on behalf of the directors and shareholders, whose property the documents are; that none of the directors are parties to the suit; that very many of the shareholders are not parties; and that the directors have not authorized, and the shareholders, or many of them, not parties to the suit, object to the production of the documents; and they allege that they hold the documents mentioned in the third schedule as the agents and on behalf of the shareholders who were parties to the deed of the 10th of May, 1848, many of whom are not parties to the suit; and that some of those parties decline to authorize the production of these documents. With regard to the objection to the production upon the ground of parties being interested in the documents who are not parties to the suit, I am of opinion that the defendants sufficiently represent the whole of the partners or shareholders for all the purposes of the litigation; and, apart from the question of privilege, these documents ought to be produced by the defendants. The opinion I have formed will not be found at variance with any of the authorities which have been cited, when those cases are fully considered. In *Walburn v. Ingleby*, 1 My. & K. 61, the documents were not in the actual possession of the party, but were in the possession of the solicitor upon whom the order was made, that solicitor being deemed to be the common agent of the party to the suit, and other parties not before the court, and who opposed the production. The order was professed to be made upon the principle that the court has a right to give the plaintiff whatever access the defendant himself would be entitled to. And this decision was affirmed by the lord chancellor. It is true, that, in *Murray v. Walter*, Cr. & Ph. 114, Lord Cottenham observed, that there must be some peculiarity in the case of *Walburn v. Ingleby*, which does not appear in the report, and refused to order the defendant to produce the documents in the possession of the treasurer of a partnership, who was the agent of the defendant and the other partners in such partnership. He decided that the practice was not to order a defendant to produce documents held by an agent for the defendant and others; and he observed, (as the apparent ground of that decision,) "When documents are in the possession of A., B., and C., you cannot order that A. shall produce them, and that for the best possible reason, namely, that he could not produce them." In *Reid v. Langlois*, 1 Mac. & G. 627; s. c. 14 Jur. 467, one partner was protected from producing documents belonging to the partnership, though in his own actual possession. But in that case the other partner, not before the court, was deemed to have had a distinct interest. The suit related to a ship, which the defendant alleged to belong to himself alone, whereas

Glyn v. Caulfield.

the documents required to be produced for inspection belonged to the partnership of himself and his father. Besides, even if the ship had belonged to the partnership, — which it did not, being registered in the name of the defendant alone, — so that the interest of the absent partner had been identical with that of the defendant, as regards both the ship and the documents, a case of two partners presents no difficulty in bringing both before the court; but such a case is totally different from that of a company consisting of a numerous body of shareholders.

As regards this case, it is one of that class in which it is considered that convenience, if not necessity, requires that some of the shareholders in a company should represent the rest for the purposes of litigation. In *Taylor v. Rundell*, Cr. & Ph. 104, Lord Cottenham observes, "If a defendant has a joint possession of a document with somebody else, who is not before the court, the court will not order him to produce it; and this for two reasons: the one is, that a party will not be ordered to do that which he cannot or may not be able to do; the other is, that another party, not present, has an interest in the document which the court cannot deal with." The present case does not fall within either of these reasons. The defendants in this case, physically speaking, can produce the documents; and, legally speaking, they ought to produce them, because there is no other person having an interest distinct from their own interest — that is, the common partnership interest — to form a ground why, according to the second of the above reasons, the defendants should not be ordered to produce the documents. It appears to me, therefore, that neither of these decisions of Lord Cottenham militates against the production of the documents, and that the present case is not within the principles, as stated by Lord Cottenham, upon which protection has been given. And I may add, that in *Lopes v. Deacon*, 6 Beav. 256, Lord Langdale intimated his disapprobation of exempting from production in such cases.

With respect to the second ground of protection, viz., that of privilege, I will consider the documents with reference to the persons by and to whom they were written, and also in relation to their character and object. Some of the documents consist of communications between the defendants or some of the shareholders on the one hand, and the solicitors of the company on the other hand, after the dispute. These latter documents are clearly exempted from production; and such would be the case even if they were made through the medium of an agent of the solicitor. This is established by *Reid v. Langlois*, 1 Mac. & G. 627; s. c. 14 Jur. 467, and by *Steele v. Stewart*, 1 Ph. 571. Other documents consist of letters, by the defendants Elliott, Wilson, and Brownrigg, to the directors, to the secretary, and to the agents in India, and were confidential communications after the matters in question in this suit had arisen, and in contemplation of, or pending, proceedings in respect of various matters, and in particular of the claims of the plaintiffs, and for the purpose of communicating to the persons to whom they were addressed the proceedings adopted in respect of such claims, and the opinion of the legal advisers consulted

Glyn v. Caulfield.

by the defendants, or for the purpose of being submitted to, or of obtaining information to be submitted to, such legal advisers and the shareholders. Other documents consist of letters to the defendants Elliott, Wilson, and Brownrigg, by the directors, or the secretary, or the agents in India, and are confidential communications after the matters in question in the suit had arisen, and in contemplation of, or pending, proceedings in respect of various matters, and in particular of the plaintiffs' claim, and for the purpose of being communicated to such legal advisers and the shareholders, and for the purpose of obtaining their opinions thereon. And all the documents enumerated in the second and third schedules were confidential documents, written after the matters in question in this suit had arisen, and in contemplation of, or pending, proceedings in respect of such matters, and for the purpose, among other objects, of assisting the defence of the defendants and the shareholders against any claims or proceedings in respect of such matters.

Now, so far as the parties by or to whom these letters were sent were shareholders, I am of opinion that the letters are not privileged, except such parts thereof as contain the opinions of the legal advisers. It was decided in *Whitbread v. Gurney*, 1 Younge, 541, that where there are several defendants they are bound to produce letters which have passed between them with reference to their defence; and in the recent case of *Goodall v. Little*, 1 Sim., N. S., 163, Lord Cranworth, V. C., has decided, that "there is no protection as to letters between parties themselves," or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they were sent to communicate them in professional confidence to his solicitor. Professional privilege is a ground of exemption from production, adopted simply from necessity, as forcibly shown by Lord Brougham in *Greenough v. Gaskill*, 1 My. & K. 103, and ought to extend no further than is absolutely necessary to enable the client to obtain professional advice with safety. Beyond what is absolutely necessary for this purpose, it ought not to be allowed to curtail that most important and valuable power of a court of equity — the power of compelling a discovery. In this case, all the parties interested in the documents are virtually before the court, the defendants representing the whole partnership, and the defendants have the actual possession of the documents. These two circumstances are not to be found combined in any case where the production and inspection of documents has been refused upon the ground of the interest of other parties than the immediate defendants in the documents of which the inspection has been asked, or upon the grounds connected with the possession; and under such circumstances, I think there is no principle which exempts documents so circumstanced from inspection. With regard to the character of the papers, the objection to production upon the ground that they relate to the matters in dispute in the cause, and arose out of communications between the parties themselves, with a view to their defence in the suit, is not supported either upon principle or authority. The appeal must, therefore, be dismissed, and with costs.

Kirkpatrick's Trust, <i>in re</i> ,	152
(Order of Reference — <i>Ex parte</i> Proceedings — Investment of Funds — Parties interested.)	
Knaggs v. Knaggs,	238
(Pleading — Joinder of Issue — <i>Similiter</i> .)	
Lambert v. Smith,	394
(Insolvent Act, 1 & 2 Vict. c. 110, s. 69, 75 — Discharge — Schedule.)	
Leech v. Clabburn,	581
(Appearance <i>sec. stat.</i> — Infant.)	
Lemann v. Lemann,	598
(1 Vict. c. 26, s. 9 — Foot or End.)	
Levinson v. Syer,	353
(Warrant of Attorney — Attesting Witness — 1 & 2 Vict. c. 110, s. 9.)	
Lock v. De Burgh,	65
(Rents — Apportionment.)	
Longmeid & Wife v. Holliday,	562
(Case — Breach of Warranty — Action, by whom maintainable.)	
Lowe v. Carpenter,	450
(2 & 3 Will. 4, c. 71 — Right of Way — Pleading.)	
Lowndes's Trust, <i>in re</i> ,	60
(Payment of Dividends — Estate for Life — Prospective Order — Evidence.)	
Marson & another v. Lund,	319
(<i>Scire Facias</i> — Stat. 7 & 8 Vict. c. 110 — Pleading.)	
Massey v. Goodall,	326
(<i>Assumpsit</i> — Pleading — Necessary Allegations.)	
Master Warden, Assistants, and Fellowship of the Company of Tobacco-pipe Makers v. Loder,	309
(Limitations, Statute of — 21 Jac. 1, c. 16, s. 3 — Debt for Penalty under a By-law.)	
Matthews v. Pincomb,	70
(Common Claims — Special Claim — Legacy and Interest.)	
Milner, <i>ex parte</i> ; <i>in re</i> Milner v. Rhoden,	371
(<i>Mandamus</i> to the Judge of a County Court to hear and determine a Plaintiff.)	
Morgan v. Morgan,	130
(Accumulation — Thellusson Act — Tenant for Life.)	
Morison v. Moat,	14
(Injunction — Secret of compounding Medicines.)	
Moseley v. Hide,	247
(Sale of Estate — Conditions — Power to convey — Right to recover a Deposit.)	

TABLE OF CASES.

xiii

Newton v. The Grand Junction Railway Company,	557
(Patent — Combination of Things new and old — Imitation.)	
North London Junction Railway Company, <i>in re</i>,	95
(Joint-stock Companies Winding-up Acts — Provisional Committee-man — Authority.)	
Oundle Union Brewery Company, <i>in re</i>,	93
(Joint-stock Companies Winding-up Acts — Contributory.)	
Parlby v. Parlby,	593
(Pleading — Evidence — Absence of Witness.)	
Pawsey v. Barnes,	66
(Claim — Statute of Limitations — Produce of Real Estate directed to be sold — Stale Demands.)	
Pears v. Wilson,	445
(County Court — Jurisdiction — Legacy — Record — Prohibition.)	
Peters v. Beer,	63
(Examination of Witnesses — Commissioners — Fees — Depositions — Lien.)	
Philps v. Evans,	37
(Will — Construction — "Personal Representative" — "Next of Kin.")	
Plasterers Company v. The Parish Clerks Company,	481
(Easement — Light — Enjoyment for Twenty Years — Parol Agreement — Payment of Rent for Lights.)	
Rackham v. Cooper,	68
(Claims — Practice — Affidavit of Service — Non-appearance of Plaintiff.)	
Reece, <i>ex parte</i>,	6
(Judgment — Charging Order — Stop Order against Payment of Dividends.)	
Regina v. Aldham and the United Parishes Insurance Society,	365
(Friendly Society — Notice of Meeting — Requisition upon Officers.)	
Regina v. The Ambergate, Nottingham, and Boston and Eastern Junction Railway Company,	328
(Railways — Stat. 9 & 10 Vict. c. 155, s. 73 — "Between," Meaning of — <i>Mandamus</i> .)	
Regina v. Caudwell,	352
(Practice — Motion for a New Trial in a Criminal Case — Presence of Defendant in Court.)	
Regina v. The Dean and Chapter of Rochester,	269
(Mandamus — Grammar School — Removal of Master — Visitor — Disqualification — Excess of Jurisdiction.)	
Regina v. The Guardians of the Poor of Oxford,	196
(Master of Workhouse, Appointment of — 11 Geo. 3, c. 14, s. 27 — Vacancy.)	
Regina v. Haslam & another,	321
(Poor Rates — Fixtures — Mechanical Apparatus.)	
Regina v. Hellier,	253
(Conviction — Appeal — Order to pay Costs — Acquiescence — Removal by <i>Certiorari</i> .)	

<i>Regina v. Isaacs</i> ,	185
(Practice — <i>Habeas Corpus</i> to bring Prisoner before Justices — Charge of Felony — Application at Chambers.)	
<i>Regina v. The Justices of Middlesex</i> ,	267
(Costs of <i>Mandamus</i> to Sessions.)	
<i>Regina v. The Lancashire and Yorkshire Railway Company</i> ,	259
(Railway Company — Duty to complete Road — <i>Mandamus</i> .)	
<i>Regina v. The London and North-western Railway Company</i> ,	220
(Railway Company — Compulsory Purchase of Land — <i>Mandamus</i> — Return.)	
<i>Regina v. Parkinson</i> ,	352
(Practice — Motion for a New Trial in a Criminal Case — Presence of Defendant in Court.)	
<i>Regina v. The Poor-law Commissioners</i> ,	189
(Poor Laws — Appointment of Officers — Regulation of Workhouse — Rescinding Regulations — Quashing Order.)	
<i>Regina v. The South-eastern Railway Company</i> ,	214
(Railway Company — Right to cross Turnpike — Option of the Company as to the Manner of Crossing.)	
<i>Regina v. Wilson</i> ,	209
(Maintenance of Pauper — Order of Justices — Appeal.)	
<i>Regina v. The York, Newcastle, and Berwick Railway Company</i> ,	259
(Railway Company — Duty to complete Road — <i>Mandamus</i> .)	
<i>Richardson v. The South-eastern Railway Company</i> ,	426
(Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18 — Compensation — Jury — Costs — Sects. 38 and 51 incorporated in Sect. 68.)	
<i>Ring v. Jarman</i> ,	154
(Pleading — Parties — Next of Kin.)	
<i>Robinson & Wife v. Bristol</i> ,	377
(Adowson — <i>Quare Impedit</i> — United Churches — Act of Union, Effect of — Words of Description in Deed — Disseizin by Usurpation — 7 Ann. c. 18.)	
<i>Rowley v. Adams</i> ,	124
(Trustee — 13 & 14 Vict. c. 60 — Copyholds — Decree for Sale — Legal Estate — Refusal to surrender — Vesting Order — <i>Feme Covert</i> .)	
<i>Royal Bank of Australia, in re</i> ,	51
(Joint-stock Companies Winding-up Acts — Documents — Creditors — Inspection.)	
<i>Russell v. The East Anglian Railway Company</i> ,	137
(Companies Clauses Consolidation Act, 1845 — Bond Creditors — Equitable Lien — Receiver — Practice.)	
<i>Russell's Estate, in re</i> ,	65
(Infants — Guardian — Petition — Next Friend.)	
<i>Savory, in the Goods of</i> ,	583
(1 Vict. c. 26, s. 9 — Execution by Testator's Initials.)	

TABLE OF CASES.

xv

Scott v. De Richebourg,	374
(Practice — Set-off of Costs — Attorney's Lien — 93d Reg. Gen. H. T., 2 Will. 4.)	
Sellers v. Dickinson,	544
(Patent — New Combination — Specification — Infringement.)	
Shardlow v. Gaze,	69
(Claims — Evidence — Plaintiff's Affidavit.)	
Simpson's Settlement, <i>in the Matter of</i> ,	58
(Power — Default of Appointment — Joint and separate Powers of Ap- pointment.)	
Sivewright v. Archibald,	286
(Broker's Law — Entry of Contract — Bought and sold Notes — Variance between them — Statute of Frauds — Memorandum.)	
Smith v. Cartwright,	528
(Custom to measure Coals — Right to weigh Coals by Statute — Coal- meter Officer not Servant of Corporation — Validity of Appointment not under Seal.)	
Smith v. Howell,	490
(Covenant to indemnify — Rent — Repairs — Costs — Judgment by Default — Time of Liability accruing.)	
Spike, <i>in re</i> ,	10
(Taxation.)	
Stainbank & others v. Fenning,	412
(Ship and Shipping — Master — Hypothecation — Form of Instrument — Maritime Risk — Insurable Interest — Loan.)	
Steiner v. Heald & others,	536
(Patent — New Manufacture — Garancine — Fresh and spent Madder.)	
Sunderland, The, Marine Insurance Company v. Kearney & another,	312
(Policy of Insurance — Deed Poll — Absolute Covenant — Liability of incorporated Company — Averment of sufficient Funds — Action of Debt — Joinder of Plaintiffs.)	
Symons v. May,	541
(Insolvent Act, (India,) 11 Vict. c. 21, s. 6 — Schedule — Bills, Description of — Sufficiency of.)	
Tipping v. Howard,	99
("Legal Representatives" — Construction.)	
Tobacco-pipe Makers v. Loder,	309
(Limitations, Statute of — 21 Jac. 1, c. 16, s. 3 — Debt for Penalty under a By-law.)	
Trye v. The Corporation of Gloucester,	73
(Mortmain.)	
Turner & others, Assignees, v. The Trustees of the Liverpool Docks,	507
(Stoppage <i>in Transitu</i> — Bill of Lading making Cargo deliverable to Consignor's Order — Delivery on board Consignor's Vessel — Pleading — Not possessed.)	

United Parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, <i>in re</i> ,	189
(Poor Laws — Appointment of Officers — Regulations of Workhouse — Re- scinding Regulation — Quashing Order.)	
Valpy <i>v.</i> Oakeley,	168
(Contract — Damages, Measure of — Non-delivery of Goods — Payment by Bill afterwards dishonored — Bankrupt.)	
Vestry-men of St. James, Westminster, <i>in re</i> ,	189
(Poor Laws — Appointment of Officers — Regulations of Workhouse — Re- scinding Regulations — Quashing Order.)	
Walker, <i>ex parte</i> ,	51
(Joint-stock Companies Winding-up Acts — Documents — Creditors — In- spection.)	
Walworth <i>v.</i> Holt,	50
(Costs — Joint-stock Companies Winding-up Acts.)	
Watkins <i>v.</i> The Great Northern Railway Company,	179
(Railway Company — Construction of Railways Clauses Act, 8 & 9 Vict. c. 20, s. 55 — Obstruction of Right of Way — Action in Respect of special Damage only.)	
Watts <i>v.</i> Jefferyes,	6
(Judgment — Charging Order — Stop Order against Payment of Dividends.)	
Whitfield <i>v.</i> Parfitt,	48
(Ship Registry Acts — Bill of Sale — Mortgage — Indorsement — Redemp- tion — Costs.)	
Zulueta <i>v.</i> Vinent,	122
(Injunction — Revival — Common Order — Amended Bill — Affidavit.)	

CASES
ARGUED AND DETERMINED
IN THE
COURTS OF CHANCERY;
DURING THE YEAR 1851.

GLYN v. CAULFIELD.¹

August 5, 1851.

Production — Privilege — Partnership — Parties.

A trading company having become embarrassed, appointed three of its members, A, B, and C, to act as a committee for the shareholders in winding up its affairs, and they were empowered to send out agents to India for that purpose; and they were empowered by the directors to manage and arrange the affairs of the company. They appointed D. and E. agents to go to India.

The plaintiffs brought several actions on certain debentures against A, B, and C, as shareholders. A, B, and C. filed a bill for an injunction, and to have the debentures delivered up. The present plaintiffs then filed a bill against A, B, and C. for discovery. A, B, and C., in their answers, admitted the possession of certain documents, consisting of communications which passed between them and the directors, the secretary of the company, and the agents in India, and which were alleged to be confidential communications after the matters in question in this suit had arisen, and in contemplation of, or pending, proceedings in respect of various matters, and in particular of the claims of the plaintiffs, and for the purpose of communicating to the persons to whom they were addressed the proceedings adopted in respect of such claims, and the opinions of the legal advisers consulted by the defendants, or for the purpose of being submitted to such legal advisers and the shareholders; and they claimed protection from production:—

Held, first, overruling the objection that the defendants had the possession of the documents only as the agents of the directors and shareholders, and that they were not parties to the suit, and were not willing that the documents should be produced, that the defendants sufficiently represent the whole of the partners or shareholders for all the purposes of the suit:—

Secondly, affirming the order of Knight Bruce, V. C., for production, that the documents were not privileged, with the exception of such parts thereof as contained the opinions of the legal advisers, it being no ground of privilege that they relate to the matters in dispute, and arose out of communications between the parties themselves, with a view to their defence in the suit.

THIS was an appeal from an order of Knight Bruce, V. C. The facts of this case are fully stated by the lord chancellor in his judg-

¹ 15 Jur. 807.

Glyn v. Gaulfield.

ment; and the chief cases cited in the course of the arguments are also referred to by his lordship.

Roundell Palmer and *Cotton*, in support of the appeal.

Roll and Selwyn, contra.

LORD CHANCELLOR. This is an appeal against an order of Knight Bruce, V. C., directing the defendants to produce for inspection certain documents and papers admitted by the defendants, in their answer, to be in their possession. The facts of this case, so far as they are material for the purpose of the present appeal, are these: A partnership or company was formed by a considerable number of persons, called "The Bengal Indigo Company." The defendants Elliott and Wilson are shareholders in that company. The defendant Brownrigg was a shareholder, but he ceased to be so. The partnership or company became embarrassed, and the three defendants were appointed a committee to act for the body of shareholders in settling the claims against the company, and to coöperate with the directors in winding up its affairs. By an indenture of the 10th of May, 1848, the same defendants were empowered to send out agents to India for accomplishing the purposes above mentioned. By a power of attorney, in August, 1848, the same defendants were empowered, by the directors of the company, to manage and arrange the affairs of the company in London. In pursuance of the indenture of the 10th of May, 1848, they appointed W. B. Elliott and H. W. Crawford to proceed to India as agents.

The plaintiffs have commenced three actions upon certain instruments, designated debentures, issued by the company. The first action was against the defendants Elliott and Brownrigg; the second against the defendants Wilson and Brownrigg; and the third against the defendants Caulfield and Brownrigg. These actions are against the several defendants as shareholders or partners in the company. The defendants, on behalf of themselves and the other shareholders, filed a bill in this court against the plaintiffs for discovery and relief, praying an injunction against proceedings in the action at law, and that the plaintiffs might be decreed to deliver up the debentures upon which the actions were brought. The now plaintiffs, in aid of their actions and of their defence to the bill so filed against them, have filed the present bill of discovery, to which the defendants Elliott and Wilson put in a joint answer, and the defendant Brownrigg a separate answer; and by their answers they allege that the debentures were deposited with Messrs. Cockerell & Co., to enable them to raise money for the purposes of the company, but Messrs. Cockerell & Co. deposited the debentures with the plaintiffs in violation of their duty, as security for advances made to them for their own purposes. An order having been made in this cause by Knight Bruce, V. C., for the production of certain documents specified in the schedules to the answers, the defendants Elliott, Wilson, and Brownrigg have appealed against such order, so far as it relates to docu-

Glyn v. Caulfield.

ments specified in the second and third schedules. The actual possession by the defendants of the documents required to be produced is admitted; but exemption from production is claimed for these documents, first, for certain reasons connected with the possession thereof; and, secondly, on the ground of privilege.

With respect to the first ground, which regards the possession, the defendants allege that they hold the documents enumerated in the second schedule as the agents and on behalf of the directors and shareholders, whose property the documents are; that none of the directors are parties to the suit; that very many of the shareholders are not parties; and that the directors have not authorized, and the shareholders, or many of them, not parties to the suit, object to the production of the documents; and they allege that they hold the documents mentioned in the third schedule as the agents and on behalf of the shareholders who were parties to the deed of the 10th of May, 1848, many of whom are not parties to the suit; and that some of those parties decline to authorize the production of these documents. With regard to the objection to the production upon the ground of parties being interested in the documents who are not parties to the suit, I am of opinion that the defendants sufficiently represent the whole of the partners or shareholders for all the purposes of the litigation; and, apart from the question of privilege, these documents ought to be produced by the defendants. The opinion I have formed will not be found at variance with any of the authorities which have been cited, when those cases are fully considered. In *Walburn v. Ingleby*, 1 My. & K. 61, the documents were not in the actual possession of the party, but were in the possession of the solicitor upon whom the order was made, that solicitor being deemed to be the common agent of the party to the suit, and other parties not before the court, and who opposed the production. The order was professed to be made upon the principle that the court has a right to give the plaintiff whatever access the defendant himself would be entitled to. And this decision was affirmed by the lord chancellor. It is true, that, in *Murray v. Walter*, Cr. & Ph. 114, Lord Cottenham observed, that there must be some peculiarity in the case of *Walburn v. Ingleby*, which does not appear in the report, and refused to order the defendant to produce the documents in the possession of the treasurer of a partnership, who was the agent of the defendant and the other partners in such partnership. He decided that the practice was not to order a defendant to produce documents held by an agent for the defendant and others; and he observed, (as the apparent ground of that decision,) "When documents are in the possession of A., B., and C., you cannot order that A. shall produce them, and that for the best possible reason, namely, that he could not produce them." In *Reid v. Langlois*, 1 Mac. & G. 627; s. c. 14 Jur. 467, one partner was protected from producing documents belonging to the partnership, though in his own actual possession. But in that case the other partner, not before the court, was deemed to have had a distinct interest. The suit related to a ship, which the defendant alleged to belong to himself alone, whereas

Morison v. Moat.

ally relied on in such cases. But the relative position of Mr. Billing and Mr. Blackmore appears to me of itself to constitute such a special circumstance as to make it right to tax the bill notwithstanding payment. I cannot consider that the petitioner was, under the circumstances of this case, acting under the advice or protection of an independent solicitor, or that Mr. Billing has a right to be protected against the taxation of a paid bill under the circumstances of this case.

MORISON v. MOAT.¹

August 5, 6, and 20, 1851.

Injunction — Secret of compounding Medicines.

A party was restrained from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract.

In June, 1823, Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat, as manufacturers and venders of the medicine, for the purposes of the partnership, communicated to the latter the secret of compounding the medicine. By the partnership deed either partner was empowered to introduce another partner, by deed, to be attested by the other; and, by mutual bonds of even date, Morison bound himself not to communicate the secret of compounding the medicine to any person except a partner so introduced; whilst Moat bound himself not to communicate such secret to any person whomsoever. Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then, by deed, duly attested by Morison, appointed the defendant his successor in the partnership. Shortly after the death of Moat, the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership deed, containing a clause declaring the defendant a sleeping partner, and another clause, by which the partners covenanted not to divulge the secret of compounding the medicines to any person whomsoever. The defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison. Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs. After the determination of the partnership, the defendant made use of his knowledge of the secret communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison. Upon the application of the plaintiffs, the court granted an injunction restraining the defendant from selling, under the title or designation of "Morison's Medicine," any medicine manufactured by the defendant; and also from compounding any medicines according to the secret mentioned in the plaintiff's bill, and from in any way making use of such secret.

THE facts, arguments, and authorities cited in this case are fully detailed in his honor's judgment.

Bethell and *Shapter* appeared for the plaintiffs; and

The *Solicitor General* and *Metcalfe* for the defendant.

SIR GEORGE TURNER, V. C. This was a motion for an injunction to restrain the defendant, William Crofton Moat, from making, compounding, or selling any medicine as "Morison's Universal Medi-

¹ 15 Jur. 787.

Morison v. Moat.

cine," or as "Morison's Vegetable Universal Medicine," or from in any manner using the name of Morison in the manufacture or sale of any medicine; and from using the secret of compounding the said medicines, or any part thereof; and from communicating to any person or persons whomsoever the knowledge of the "ingredients whereof the said medicines are compounded, or the secret, or any part of the secret, of compounding the said medicines."

The facts of the case, so far as they are undisputed, are these: James Morison was the inventor and sole proprietor of the medicine or medicines in question. By an indenture bearing date the 23d of June, 1830, and made between James Morison of the one part, and Thomas Moat of the other part, reciting that James Morison was the inventor and sole proprietor of the medicine called or known by the name of "Morison's Vegetable Universal Medicine," the secret of making which he, Mr. Morison, had communicated to his son John; and then reciting "that James Morison, in consideration of the past services of the said Thomas Moat, and in further consideration that the said Thomas Moat should devote his whole time and attention to the conduct and promotion of the manufacture and sale of the said medicine or medicines, had agreed to take the said Thomas Moat into partnership with him in the manufacture and sale of such medicine or medicines upon the terms after mentioned;" it was witnessed that Morison and Moat were to be the partners in the profession and business of manufacturers and venders of the medicines for the term of twenty years and three quarters of a year, to commence and be computed from the 24th of June next ensuing, the day of the date of the indenture, upon the terms and under the provisions thereafter contained; and the style of the firm was to be "Morison, Moat, & Co., Hygeists." The profession or business of the partnership was to be carried on on certain terms, in certain premises, which are mentioned in the deed, where alone (save and except the foreign establishments) the medicines were to be compounded, and whence alone, save as aforesaid, the said medicines so made and compounded might be issued to any part of the world, through the respective agents of the copartnership; with a proviso that it should be lawful to and for the partners for the time being of the partnership to cause the establishment to be removed to and carried on at such other place or places as he or they should or might from time to time judge most convenient. The deed then witnessed that the premises in which the business was to be carried on were to be called "The British College of Health," and that Morison and Moat were to be considered to be entitled to the gains and profits of the business, and liable to the losses, in the proportion of two thirds to Morison and one third to Moat, and upon no account was any partner to draw more than two thirds of the share of the annual profits; and that if Moat should die before the 25th of March, 1851, then the interest, share, or proportion of Mr. Moat of and in the copartnership was not to devolve, as by law it would, upon the personal representatives of Moat, but it should go and belong to such person, not being a female, as Thomas Moat should by any instrument under seal, with or without power of revo-

Morison v. Moat.

cation, to be by him sealed and delivered, and to be attested by James Morison, his appointee or appointees, direct or appoint; and in default of such direction or appointment, then the interest, share, or proportion of him, Moat, of and in the partnership, should devolve upon James Morison, his appointee or appointees, executors, administrators, or assigns.

Then the deed witnessed that Moat was to devote and employ his whole time and attention in the conduct and promotion of the manufacture and sale of the medicine or medicines, or in such other manner as should best conduce to the advantage or benefit of the partnership. Morison was not to be obliged to devote any more time or attention to the manufacture and sale of the medicine or medicines, or otherwise, in and about the premises, than he should think proper; and might, if he should think proper, introduce into the copartnership any person or persons whomsoever, such person or persons not being a female or females, upon the same terms and conditions as Moat was thereby subjected to. That James Morison should, on or before the commencement of the partnership, communicate to Thomas Moat a full and true knowledge of the mode of making and compounding the medicines, and should be at liberty to communicate such knowledge to such person or persons as he was thereby empowered to introduce into the partnership. That Morison, notwithstanding any thing contained to the contrary, should be at liberty to form an establishment in any part of the world, except the United Kingdom of Great Britain, Ireland, and America, for the manufacture and sale of the medicines; and that all the medicines which he might order or receive from the partnership should be charged to him at a certain price. In case Thomas Moat should live to the expiration of the partnership, a new partnership for a further term of years was to be agreed upon between the parties before the expiration of the partnership, on terms similar to those in the indenture contained; but if Morison or Moat should happen to die before the expiration of the partnership, then an account in writing should be made and taken, under the signature of the partners for the time being, of the state of the partnership, and a balance struck between the partners and the representatives of the party so dying, for the purpose of ascertaining what then might be due from the partnership to the estate of Morison, or to the estate of Moat, as the case might be.

Then there was a proviso, that in case Morison should, under the power therein contained, introduce a partner or partners into the partnership during the life of Thomas Moat, that then a separate account should be had and taken between Morison and Moat, for the purpose of ascertaining what sum should be then due from the partnership to Morison and Moat, or either of them. Those, I think, are the substantial terms of that deed of the 23d of June, 1830. On the same 23d of June, 1830, Thomas Moat gave a bond to James Morison in the penal sum of 5000*l.*, to be considered as liquidated damages, which bond recited the partnership articles, and recited that the prosperity of the partnership would depend upon the ingredients, and

Morison v. Moat.

the mode of making and compounding the said medicine or medicines, being kept secret; and that the said James Morison, who was the inventor thereof, had communicated the secret to Thomas Moat. Then the condition of the bond was, "that Moat should not, at any time or times thereafter, in any way or manner, make known, divulge, or communicate the said secret to any person or persons whomsoever." And on the same day Morison gave a bond to Moat in the same penal sum, which, after the same recitals, including the recital as to the importance of keeping the secret, was conditioned to be void if Morison should not, at any time thereafter, in any way or manner, make known or divulge the said secret of the ingredients, and the mode of making and compounding the medicine or medicines, to any person or persons whomsoever, save and except such person or persons as he and the said Moat might introduce into the partnership under the powers of the indenture of partnership, or any of them, and except such person or persons as Morison might introduce into the foreign partnership which he was thereby authorized to establish. By a deed poll, dated the 17th of July, 1830, Thomas Moat, in the exercise of the power given to him by the partnership articles, appointed, that upon his death his share of the partnership should go to his son Horatia Shepherd Moat.

On the 24th of June, 1834, James Morison, under the power given to him by the articles, introduced his son, the plaintiff Alexander Morison, into the partnership, as a partner to the extent of one twentieth of his two thirds; and afterwards, on the 8th of July, 1835, he in like manner introduced another son, the plaintiff John Morison, into the partnership, as a partner to the same extent. The business was carried on by the partners for the time being, down to the death of Thomas Moat. Shortly before his death, and on the 29th of July, 1835, an agreement was entered into between James Morison, Thomas Moat, Alexander Morison, and John Morison of the first part, Horatio Shepherd Moat of the second part, and Crofton William Moat of the third part, reciting the deed of appointment of Horatio Shepherd Moat, and then reciting that Thomas Moat was desirous of making void the appointment, and to appoint, instead of Horatio Shepherd Moat, Crofton William Moat, as a partner in the concern, Horatio Shepherd Moat consenting.

Then the agreement recited, "That whereas the said Thomas Moat had for some time past been in an ill state of health, which had prevented him from attending to the business of the partnership, and it being intended that the above-named Crofton William Moat should, during such time as the said Thomas Moat continued unwell, transact the business of the partnership for Thomas Moat, so far as he was able to do, not being a partner, and for which service Thomas Moat was to pay him a fixed salary," — then the articles witnessed, that Thomas Moat should be allowed to revoke the appointment of the 17th of July, 1830, in favor of his son Crofton William Moat, which the said James Morison would attest when tendered to him, upon the first being cancelled, and that, during such time as it might remain unexecuted, the appointment in favor of Horatio Shepherd Moat

Morison v. Moat.

was to be placed in the hands of the bankers of the partnership. Then the articles provided that Crofton William Moat was to be allowed to come into the office as his father's servant for such time as Thomas Moat was unable to attend thereto; that a fixed salary was to be paid to Crofton William Moat by Thomas Moat during such time as Thomas Moat should be unable to attend. That agreement was afterwards followed by a deed of the 8th of August, 1835, made between Thomas Moat of the first part, Horatio Shepherd Moat of the second part, James Morison and Alexander Morison of the third part, and Crofton William Moat of the fourth part, reciting the partnership articles, the appointment of Horatio Shepherd Moat, and that it had been agreed, by and between all the parties thereto, that the deed poll by which he was appointed should be considered to be of no effect, and that the name of William Crofton Moat should be put in the place of Horatio Shepherd Moat. Then the deed witnessed that Thomas Moat revoked that appointment, and appointed Crofton William Moat to be a partner in the concern after his death.

On the 11th of August, 1835, Thomas Moat died. By a deed, dated the 22d of January, 1836, James Morison confirmed the admission of each of the plaintiffs as a partner to the extent of the twentieth part of his, James Morison's, share, and appointed that, after his decease, they should be partners in respect of the remainder of his share. By another deed, dated the 25th of February, 1837, and made between James Morison, Alexander Morison, and John Morison of the one part, and Crofton William Moat of the other part, reciting the partnership articles, and reciting that the profession or business of hygeists, and manufacturers and venders of Morison's Universal Medicine, had been carried on since the 11th of August, 1835, the day of the death of Moat, by the Morisons and Crofton William Moat, as partners in the profession or business, and then reciting a great variety of matters that are not material, it was witnessed, that Morison and the plaintiffs and Moat would remain, as and from the 11th of August, 1835, until the 25th of March, 1851, if Crofton William Moat should so long live, partners in the profession or business of hygeists, and manufacturers and venders of Morison's Vegetable Universal Medicines in Great Britain and Ireland, and in all other countries and places whatsoever, except the countries of France, Italy, and Switzerland, and also except Africa, but under and subject to the terms and conditions thereafter contained; namely, the style of the firm was to be "Morison, Moat, & Co.," and the premises in which the business was to be carried on were to be called "The British College of Health," and the medicine was to be called "Morison's Universal Medicine," and sold under that name only; and the copartners were to be entitled to the profits of the concern in the proportions of two thirds to the plaintiffs and James Morison, and one third to Crofton William Moat. The Morisons were to have the management of the business, and there are several clauses in the deed for that purpose, which vest the whole management of the business in the Morisons; and then it was agreed, "that from and immediately after the execution of the deed of partnership, the business, and all acts authorized

Morison v. Moat.

and required by the indenture to be done and executed, should be respectively conducted, carried on, done, and executed by James Morison and the plaintiffs; and that Moat should be, and be considered, a sleeping partner in the partnership, and should not in any wise interfere in the conduct or management of the business of the partnership, or draw or accept any checks, drafts, or bills for or on account of the partnership, or buy, order, or contract for any goods, merchandise, articles, or things whatever for or on behalf of the partnership; but, nevertheless, Crofton William Moat should be at liberty, once in every quarter of a year, to inspect at a seasonable time all books, documents, and writings relating to the partnership, and to make extracts from, and to take copies of, the same; and that he, Moat, should, if he thought proper, assist in taking and making the annual account, rest, and valuation, to be made pursuant to the provisions thereinbefore contained, and should sign the books wherein the general account, or rest, and valuation, and appraisement were to be entered every year, as thereinbefore directed, and should be bound and concluded by the general account."

There was also a covenant in this deed, "that none of them, James Morison, Alexander Morison, John Morison, or Crofton William Moat, would communicate or make known to any person or persons whomsoever, not being a partner or partners in the partnership, all or any of the prescriptions for the making and compounding of the medicines commonly called 'Morison's Vegetable Universal Medicines;' and that each and every of them, James Morison, Alexander Morison, John Morison, and Crofton William Moat, who should, contrary to such stipulation, communicate or make known to any person or persons, not being a partner or partners in the partnership, the prescriptions, or any of them, should pay to the fund of the partnership, as and by way of liquidated damages, for the sole benefit and advantage of the others or the other of them, James Morison, Alexander Morison, John Morison, and Crofton William Moat, the sum of 10,000*l.* of lawful money," and so on. Then it was provided also, "that with all convenient speed after the 25th of March, 1851, or immediately after the sooner determination of the partnership, an account in writing should be stated and settled between James Morison, Alexander Morison, and John Morison, or the survivor or survivors of them, or the appointees, executors, or administrators of James Morison and Crofton William Moat, his executors or administrators, of the moneys and effects of or belonging to the partnership, and also of all the debts and liabilities due or owing from or by the partnership; and upon the furnishing of the last-mentioned account, all the estate and effects and debts respectively belonging, due, or owing to the partnership should be respectively sold, called in, and converted into money, and such debts and liabilities as should then appear to be due from the partnership should be paid off and discharged, and the balance of the moneys arising from the sale, calling in, and conversion into money of the estate and effects and debts owing to the partnership should, after making such payments as aforesaid, be divided between the parties respectively entitled thereto." James Morison died in May, 1840.

Morison v. Moat.

By his will, after reciting that the appointment of January, 1836, was, as to his share, in trust for him, he gave and bequeathed "the recipe and prescriptions for preparing, manufacturing, and compounding the medicines called 'Morison's Vegetable Universal Medicines,' of which he was the proprietor and inventor, unto his sons, the plaintiffs, during their lives, or the survivor of them during his life." Then he declared that the plaintiffs should stand possessed of, in case the partnership between him and Thomas Moat should be subsisting at the time of his death, and prepare, manufacture, and compound, conformably to the provisions contained in the indenture whereby the partnership was formed, the medicines in Great Britain and Ireland, and America, respectively, for the benefit of the partnership, but nevertheless during such time only as the partnership should continue under the provisions contained in the same indenture; and should, as to Great Britain, Ireland, and America, from and immediately after the determination of the copartnership, in case the same should be subsisting at the time of his death, or from and immediately after his decease, in case the said copartnership should not be subsisting, and as to all other states and countries, immediately after his decease, compound and vend medicines at such times as they should think fit; and then, after the death of the survivor of the sons, at the expiration of the term of twenty-one years, the parties were to sell and dispose of the recipe or prescription, either by public auction or by private contract, and to pay the moneys to arise from the sale to his executors, as part of the residue of his personal estate and effects; and he directed that Alexander Morison and John Morison should, immediately after his decease, "and that every other person who should become entitled to the possession of the said recipes and prescriptions, under the bequest thereinbefore contained, should forthwith, on his continuing to prepare, manufacture, and compound the said medicines, enter into, execute, and deliver to the said executors, or the survivors or survivor of them, or the executors, administrators, and assigns of the survivor, a bond in the penal sum of 10,000*l.*, with a condition thereunder written for making the same void, if the person entering into, executing, and delivering such bond should not at any time communicate or make known, either directly or indirectly, to any person or persons whomsoever, except the purchaser or purchasers thereof under the trusts aforesaid, the recipes and prescriptions for making the said medicines, or any of them;" and then by his will he authorized the parties in possession of the prescriptions to form establishments in any other country, at any time, if they should think fit so to do. I do not think there is any thing more in that will which it is material to take notice of. He settled the shares of the daughters on them. I believe that is the substance of the provisions of his will. James Morison died in May, 1840; and on the 1st of June, 1843, three deeds were executed, for the purpose of finally settling the accounts of the partnership of James Morison and Thomas Moat, and carrying out some arrangements with reference to some outstanding debts due to that partnership. Part of these arrangements was to secure an annuity to the widow of Thomas Moat, payable out of

Morison v. Moat.

the profits of the business, and out of the purchase moneys of the recipes or prescriptions for the medicines, in case the same should be sold. The defendant was a party to each of these deeds, and each of them recited the will of James Morison, and the dispositions thereby made of the recipes and prescriptions. Another deed was afterwards executed, which does not appear to be material to the present investigation.

On the 25th of March, 1851, the partnership expired, and thereupon the stock of drugs, manufactured medicine, labels for boxes, and government stamps was divided between parties, according to their respective shares, and the stock of printed bills and advertisements, and other printed papers, was taken by the plaintiffs, they paying the defendant one third of the cost price thereof. It appears that four engraved plates or blocks had for many years been appropriated, by the commissioners of stamps and taxes, for printing the government stamps wrapped round the medicines, and that the defendant, at the termination of the partnership, did not claim the right to use these plates; but that in March, 1851, he applied to the commissioners for the grant of a plate with the words, "Morison's Universal Medicine, by C. W. Moat;" and that, this application not having been granted, he, in April, 1851, applied to the commissioners to refuse the plaintiffs the use of the original plates; and that, this application having also failed, he, in May, 1851, claimed from the plaintiffs the share of those plates; and that, failing in this also, he, in June, 1851, filed a bill against the plaintiffs to have the partnership wound up, and the plates divided, and for an injunction to restrain the plaintiffs from having the use of them. On the 5th of June, 1851, he moved before me for the injunction, but I refused the motion.

On the 17th of July, the present bill was filed. In addition to the several matters above detailed, it states and charges "that the secret of making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicine,' was never communicated to the defendant by James Morison, deceased, or by any other person than Thomas Moat, deceased; and that James Morison was induced to concur in the deed of the 8th of August, 1835, on the faith, and on the assurance by Thomas Moat, who was then on his death bed, that the secret of making and compounding the medicine or medicines had not been communicated, and would not be communicated, by Thomas Moat to the defendant, or to any person whomsoever; and that he, Thomas Moat, had not committed the secret to writing. That it was on the faith and understanding on the part of the plaintiffs that the defendant did not know the secret of making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicine,' that the plaintiffs and the said James Morison entered into and executed the indenture of the 25th of February, 1837, and that the plaintiffs entered into and executed the indenture of the 31st of July, 1848. That the plaintiffs did not permit the defendant to be present at the compounding of the medicines during the partnership, and he never did acquire, by attending to the copartnership business, a knowledge of the secret of compounding

Morison v. Moat.

the medicines; though, by inspecting the books of the partnership, he might acquire a knowledge of some of the ingredients used in compounding the pills. That the plaintiffs, and the survivor of them, are alone entitled, during their lives, and the life of the survivor of them, to use the secret recipes and prescriptions, and to compound and vend the medicines called 'Morison's Vegetable Universal Medicines.' That ever since the dissolution of the partnership with the defendant, on the 25th of March, 1851, the plaintiffs have used the secret and recipes or prescriptions for making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicines,' and have compounded and vended the same medicines; and the plaintiffs' business is very large and extensive, and they have derived great profits therefrom. That they have recently discovered, and the fact is, that the defendant makes and sells pills by the name and description of 'Morison's Universal Medicines,' and uses labels on the pill boxes containing the pills, and thereby describes them as 'Morison's Universal Medicines, by C. W. Moat.' That such pills are made from or according to the recipes or prescriptions discovered by James Morison, and that the vending them as 'Morison's Universal Medicines' is a fraud on the plaintiffs. That the plaintiffs have recently discovered, and the fact is, that the defendant's father, Thomas Moat, in his lifetime, and at or about the time of executing the indenture of the 8th of August, 1835, communicated the secret of making and compounding the medicines called 'Morison's Vegetable Universal Medicines,' and delivered to him, the defendant, the original written recipes and prescriptions for compounding the medicines, which James Morison delivered to Thomas Moat at the time of executing the indenture of the 23d of June, 1830, as aforesaid; and that Thomas Moat made the communication and delivered the recipes, and that the defendant received the communication and recipes, in breach of good faith, and of their aforesaid assurances to James Morison, and in breach of the stipulations and conditions of the aforesaid several indentures and bonds made in the lifetime of Thomas Moat; and that, at the time of such communication and delivery, he, the defendant, was well acquainted with the stipulations and conditions."

Then it charges, "that the defendant was, at the time of the date of the deed, in possession of the secret unlawfully, and, as regards the plaintiffs, clandestinely, and without the same being known to or suspected by the plaintiffs, or either of them, and in contravention of the aforesaid contracts of Thomas Moat with the plaintiffs and James Morison, and which contracts the defendant is bound to observe." And then it charges, "that by the deed of the 25th of February, 1837, it is provided that all proper books of account concerning the partnership shall be kept, and that the defendant should have access thereto; and that, inasmuch as he might by that means become acquainted with the ingredients and quantities of ingredients used in compounding the medicines, it was provided by the deed that he should not disclose the secret of making and compounding the medicines." Then it charges the dissolution of the partnership, and that the labels and stamps were not delivered to the defendant by way of

Morison v. Moat.

acknowledgment of his title to use the secret. Then it charges various matters relating to labels used by the defendant in the sale of the medicines manufactured by him, in which the medicine is described as "Morison's Universal Medicine, by C. W. Moat," and other matters relating to a sign board, on which the description is, "Of the late firm of Morison, Moat, & Co., British College of Health; Mr. Moat, depot Morison's Universal Medicines;" and also matters relating to a card which the defendant circulated, on which is inscribed, "Morison's Vegetable Pills, prepared by Mr. Moat, partner of the late Mr. Morison, the hygeist." And then the bill prays for an account, and I think for an injunction, which I have already mentioned. The allegations of the bill are fully verified by the affidavit of the plaintiff John Morison. The defendant, by his affidavit in answer, states, first, that there is no patent for the medicines; he says, "that no patent or other exclusive right or privilege ever was granted to James Morison, or to any other person or persons, for the making or manufacturing or selling the medicine or medicines called 'Morison's Vegetable Universal Medicine.'" And then he says, "that Moat, as the active partner, attended to and superintended the making and manufacturing and compounding the medicine or medicines called 'Morison's Vegetable Universal Pills.'" Then he states the articles of agreement of the 29th of July, 1835, and he says, "that, pursuant to those articles of agreement, he attended at the office of the partnership and conducted the affairs thereof in the place of his father, Thomas Moat, and in the performance of those duties he gained a knowledge of the ingredients used in making and compounding the medicine or medicines, and of compounding, preparing, and mixing the drugs for the same." And he further says, "that when he did, as hereinafter mentioned, become possessed of the recipe or prescription in writing for making and compounding such medicine or medicines, the said written recipe or prescription agreed with the facts respecting the making and compounding the medicine or medicines of which I had so previously acquired knowledge as aforesaid."

Then he says, "On the death of his father, Thomas Moat, which took place on the 11th of August, 1835, he became an active partner in the partnership in the place of his father, and he was so treated and acknowledged by James Morison, and by the plaintiffs; and upon so becoming a member of, and active partner in, the partnership, he did for about a period of two months, in common with his partners, or some of them, superintend the business of the partnership, and during that time he saw the mode and manner of making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicine,' and the ingredients thereof, and the proportions in which such ingredients were used, and he thereby acquired a complete practical knowledge of the ingredients of the medicine or medicines, and of the mode of compounding and mixing the same, and he became fully capable himself of making and compounding the said medicine or medicines." Then, referring to the deed of 1837, he says, as to the covenant against disclosing the secret, that that clause was inserted in the deed, "not because I had been a sleeping partner in the

Morison v. Moat.

copartnership from the time of the death of my father, which was not in fact the case, but because differences had arisen between Messrs. Morison and myself, and with a view to the amicable settlement of such differences. And I further say that the recipe for making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicine,' in the handwriting of James Morison, was communicated to me by my father immediately before his death, and in contemplation of my succeeding him as a member and active partner of the partnership; and I deny that James Morison was induced to concur in the deed of the 8th of August, 1835, on the faith and on the assurance by Thomas Moat that the secret of making and compounding the medicine or medicines had not been, and would not be, communicated by Thomas Moat to me; and I deny that it was on the faith and understanding on the part of the plaintiffs, or either of them, that I did not know the secret of making and compounding the medicine or medicines called 'Morison's Vegetable Universal Medicine,' that James Morison, deceased, or the plaintiffs, or any or one of them, entered into and executed the indenture of the 25th of February, 1837, and that the plaintiffs, or either of them, executed the indenture of the 31st of July, 1848, in the affidavit of John Morison mentioned; for I say that James Morison, deceased, and the plaintiffs, did know, shortly after the death of my father, and long before the execution of the indenture of the 25th of February, 1837, that I was in possession of the secret, or recipe, or prescription; and shortly after my father's death, and on several occasions previous to the 25th of February, 1837, I had conversations with James Morison, and I also had, before the 25th of February, 1837, conversations with the plaintiffs, relative to the prescription and to the preparing and manufacturing the medicine or medicines; and that at the times of each of such several conversations James Morison well knew, and the plaintiffs, as I believe, also well knew, that I had in my possession the written recipe or prescription as aforesaid."

Then he claims the right to manufacture and vend the medicines for his own benefit. Then he says, "that the sale of the medicines has been very extensive, and that great profits have been derived therefrom, namely, through the same having been constantly and prominently brought before the attention of the public by a very extensive system of advertising the medicines in an uninterrupted course from the commencement of the partnership of Morison, Moat, & Co., in the year 1830, down to the expiration of the said partnership, of which I was a member, on the 25th of March last; and that such system of advertising has, during the whole of such period, been continued at an expense to the said several partnerships of several thousand pounds yearly; and I verily believe that such expense of advertising was not lessened, or not materially or intentionally lessened, in the last year of the partnership between the plaintiffs and myself; and I say that the said medicines having been so kept prominently before the attention of the public by the said several partnerships out of their gains and profits, and at a very great expense in advertising the same as aforesaid, the said plaintiffs now claim the whole benefit

Morison v. Moat.

resulting from such expenditure of partnership funds for their own individual benefit; and I deny that the plaintiffs have recently discovered that I make and sell pills by the name and description of 'Morison's Universal Medicines,' for I say that I have made and publicly sold such pills since the month of April last, and have publicly advertised the sale thereof by me; and I have every reason to believe, and do believe, that the plaintiffs have well known that I so made and sold the medicines from the period last aforesaid." Then he says, "The medicines so made by me are made according to the prescription of James Morison;" and he denies "that the vending of such medicines as 'Morison's Vegetable Universal Medicines' is a fraud on the plaintiffs." Then he denies that, "at the date of the deed of the 25th of February, 1837, I was in possession of the prescription or secret unlawfully, as regarded the plaintiffs, or either of them;" and he says, "that the plaintiffs, at the date of that deed, perfectly well knew that he was in possession of such prescription or secret, and that such possession was not in contravention of any contract of Thomas Moat with James Morison and the plaintiffs, or any of them, which he was bound to observe." Then he says, "that the provision contained in the deed of 1837," about not disclosing the secret, "was entered into upon terms of perfect equality, and for the same reason, by all the parties to the last-mentioned deed;" and he further says, "that in none of the partnership or other deeds relating to the partnership firms of Morison, Moat, & Co., or any of those firms, is contained any clause, contract, provision, or stipulation restraining the partners of the firms, or any of them, from making, manufacturing, or vending the medicines called 'Morison's Vegetable Universal Medicines,' after the expiration of the partnership term." Then he says, referring to the division of the labels, and so on, at the termination of the partnership, "that at the time of the division the plaintiffs well knew that I was in possession of the aforesaid secret or prescription, and that such division was made without any stipulation or condition whatsoever, and without any reason being assigned for the same in regard to any of the parties sharing in such division." Then he says, "that at the meeting which took place, Mr. Arthur Walker, the solicitor of the plaintiffs, asked Mr. Dobinson, who was then present, whether I intended to make and sell the medicines; and Mr. Arthur Walker, on being informed by Mr. Dobinson that I did intend to make and sell the medicines, replied that the plaintiffs would file a bill in this court against me to restrain me from so doing." Then he says, "that he did not, at the meeting on the 25th of March last, claim to have the right to use the plates or blocks, or to have any value placed thereon, as part of the effects of the partnership, only because the subject of the plates or blocks was not then mentioned, and because they had wholly escaped my recollection." Then he refers to the correspondence which took place after the dissolution of the partnership, and he says that although he does claim a right to manufacture and sell the medicines, and to make and manufacture the same according to the prescriptions of the partnership, of which he was a member, he

Morison v. Moat.

by no means claims, nor has he ever claimed, nor does he wish to have it thought or understood, "nor have I ever wished to have it thought or understood by the public, or by any person or persons whomsoever, that I either do vend, or claim any right to vend, the same medicines, or any of them, as having been made or manufactured by the plaintiffs, or either of them, or by any person other than myself; and that in all my advertisements and placards respecting the medicines I have been careful to show, and have shown, in a plain, intelligible, and unmistakable manner, that the medicines sold by me are made and manufactured by myself, and by no other person or persons whomsoever, although I do at the same time represent, as the fact is, that the medicines are the same medicines as are well and popularly known under the name and title of 'Morison's Vegetable Universal Medicines.'"

Then he says, "that since the 6th of June last, there has been no negotiation for a compromise of the differences and difficulties between the plaintiffs and himself concerning the matters aforesaid, which have proceeded between his solicitors and the solicitors of the plaintiffs, except between the 1st of July and the 9th of July." Then he goes into the matter relating to his card and sign board, and so on. There are affidavits in reply on the part of the plaintiffs; and John Morison, by his affidavit, says he "denies the statement contained in the affidavit of the defendant, that upon the death of his father, Thomas Moat, which took place on the 11th of August, 1835, he became an active partner in the partnership in the place of his father, and was so treated and acknowledged by me, deponent, and by James Morison, and by the plaintiff Alexander Morison; and that, upon the defendant so becoming a member of the partnership, he ever became an active partner therein, or did, for a period of about two months, in common with his partners, or some of them, superintend the business of the partnership; or during that time that he ever saw the mode and manner of making and compounding the medicines and the ingredients thereof, and the proportions in which such ingredients were used, and thereby acquired a complete or any practical knowledge of the ingredients of the medicines, and of the mode of compounding and mixing the same, and became fully capable himself of making and compounding the medicines; for that I have examined the cash book of the firm for the period of one month immediately preceding the decease of Thomas Moat, and for six months immediately thereafter, and there is no entry whatever, in either of the books, in the handwriting of the defendant, all the entries being in the handwriting of James Morison, myself, or Alexander Morison, or the clerk or accountant then employed by the firm." Then he says, "that the cash book and letter book are the only books in which entries are made by the partners themselves, the entries in the ledger or other books of the firm being made by the clerk or accountant for the time being of the firm."

Then he says, "From my own knowledge of the books, I believe the defendant never, at any time whatever, made or caused to be made any entry or entries in the books, or any of them." Then he

Morison v. Moat.

says, " With reference to the statement contained in the affidavit of the defendant, that the recipe for making and compounding the medicine, in the handwriting of James Morison, was communicated to the defendant by his father immediately before his death, and in contemplation of the defendant succeeding him as a member and active partner of the partnership, I say that my late father, James Morison, has frequently told me, that Thomas Moat, who was a person of high honor and integrity, on his death bed declared to my father that he had not divulged the secret to any person, and would not do so; and I verily believe the statement so as aforesaid made by the defendant to be untrue; and I deny that I, or James Morison deceased, or the plaintiff Alexander Morison, did know, shortly after the death of the defendant's father, and long before the execution of the deed of February, 1837, that the defendant was in the possession of the secret recipe or prescription." Then he says, " To the best of my knowledge, recollection, and belief, I deny that, shortly after the death of the defendant's father, and on several or any occasions previous to the 25th of February, 1837, the defendant had conversations with James Morison, or with me, or the plaintiff Alexander Morison, except when the defendant so required to know the ingredients, and to be present at the compounding and mixing the medicine as aforesaid;" [that refers to some application which he made to them relative to the prescription, and the preparing and manufacturing the said medicine or medicines;] " for I say that the said James Morison had a strong personal dislike to the said defendant, and would not meet or converse with him, either on business or otherwise." Then he says, " that neither I, nor my said partner Alexander Morison, were on terms of intimacy with the said defendant, and never discussed matters of business with him, except as to money transactions, the said defendant never having been in any way treated or considered as an active partner." Then there are also several affidavits of the workmen, which I do not go through, because I think it is sufficient to say, that, in my judgment, they conclusively prove that the defendant did not acquire the knowledge of the secret by the superintendence of, or participation in, the business of the partnership." Now, the plaintiffs' case is rested in argument on the ground that the defendant had obtained this secret by breach of faith or of contract on the part of Thomas Moat. The subsidiary ground brought forward by the bill, of the defendant selling his medicine under the original name and description, was relied on rather in support of the case of breach of faith and of contract than as a separate and distinct ground for the interference of the court. On that part of the case it is sufficient, therefore, to observe that there might be difficulty in maintaining it; at all events, until the plaintiffs should have established their right at law. The true question is, whether, under the circumstances of this case, the court ought to interfere by injunction on the ground of breach of faith or of contract. That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have, indeed, been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others

Morison v. Moat.

to contract, and in others, again, it has been treated as founded upon trust or confidence; meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces, against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred. But upon whatever ground the jurisdiction is founded, the authorities leave no doubt as to the exercise of it. The case of *Green v. Folghamb*, 1 Sim. & S. 398, which was cited for the plaintiffs, and where the court decreed an account against a party to whom a secret of this nature had been intrusted, might perhaps be accounted for upon the ground that the defendant in the case had expressly admitted himself to be a trustee of the secret. But there are other cases in which the court has interfered without any such admission. In *Williams v. Williams*, 3 Mer. 159, Lord Ellenborough, dealing with a case in which a father had divulged a secret like the present to a son, and had delivered to him a stock of medicines upon the faith of a future partnership being formed between them when the son should come of age, puts the case, as to confidence, in these terms: "If, on a treaty with the son while an infant, for his becoming a partner when of age, the plaintiff had, in the confidence of a trust reposed in him, communicated to him this secret, and at the same time given him the possession of the articles mentioned in the bill; and, instead of acting according to his trust, the son had taken to himself the exclusive dominion over these articles, and begun to vend them without permission, it must be said that he had no right in any case so to act, and that he was bound either to abide by or to waive the agreement. If, then, he had intended to abide by the agreement, the injunction was so far right." That was an injunction that had been granted by the vice chancellor. "And if to waive it, he was bound to return the articles; and so far the injunction was also right in that case. Upon the plaintiff's affidavit, therefore, the injunction was properly granted as to this part of the case. But so far as the injunction goes to restrain the defendant from communicating the secret, upon general principles I do not think that the court ought to struggle to protect this sort of secrets in medicine. The court is bound, indeed, to protect them, in cases of patents, to the full extent of what was intended by the grant of the patent, because the patentee is a purchaser from the public, and bound to communicate his secret to the public at the expiration of the patent. Then, whether the principle can be extended to such a case as this — whether a contracting party is entitled to the protection of the court, in the exercise of its jurisdiction to decree the specific performance of agreements, by restraining a party to the contract from divulging the secret he has promised to keep — that is a question which would require very great consideration. But the present case is not one which calls for the determination of it. If the defendant has already disclosed the secret, the injunction can be of no use; if he only threatens to disclose, it then becomes necessary to look at his affidavit; and by that he insists that what he has to disclose is no secret at all." In that case, the son said he had a right otherwise than from the father, and that it came

Morison v. Moat.

to him from his mother. "Then," continued his lordship, "how is the court to try this question?" Here Lord Eldon, I think, distinctly lays down the doctrine—it does not carry that case farther—it does not go very far—that articles delivered over upon the faith and in the confidence of a future arrangement cannot be used for a purpose different from that for which they were delivered over. The cases, however, do not stop here. In *Yovatt v. Winyard*, 1 Jac. & W. 395, Lord Eldon, upon the express ground of breach of trust and confidence, granted an injunction to restrain the defendant, who had been the plaintiff's assistant in his business, from using or communicating recipes which he had surreptitiously copied whilst in the plaintiff's service. There, there was a motion, "upon certificate of the bill filed, and affidavit, to restrain the defendant from making use of, or communicating, certain recipes for veterinary medicines, and from printing and publishing certain papers of directions for the mode of administering them, and of managing the animals while taking them."

The motion was put upon the ground of its being "a breach of confidence towards an employer, in the manner of acquiring the knowledge." Sir Charles Wetherell contended, "that though the court might not protect a secret from disclosure by one to whom the proprietor had himself communicated it, yet it would when the person sought to be restrained had clandestinely possessed himself of it." "In those cases," (referring to *Newberry v. James*, 2 Mer. 447, and *Williams v. Williams*,) his lordship says, "in those cases the knowledge was communicated for a particular purpose, and it was attempted to prevent the party from using it for any other; but here the first discovery was obtained by a breach of duty, and in violation of a positive agreement."

The lord chancellor "granted the injunction on the ground of there having been a breach of trust and confidence; but confined it so as not to prevent the defendant from administering the medicine to any animals then under a course, it being stated in the papers of directions that a sudden discontinuance would be prejudicial." The question again came before Lord Eldon in Mr. Abernethy's case, (*Abernethy v. Hutchinson*, 3 L. J., Ch., 209,) in which Mr. Abernethy had filed a bill to restrain the publication of the lectures delivered by him at St. Bartholomew's Hospital, and I well remember that upon the first argument he refused to grant the injunction on the ground of copyright, Mr. Abernethy not being able to swear that the whole lecture was written; but that afterwards, on a second argument, he granted it on the ground of breach of confidence.

We have also Lord Eldon's opinion referred to by Lord Cottenham in *Prince Albert v. Strange*, as contained in a note, with which he had been furnished by Mr. Cooper, of the case of *Wyatt v. Wilson*, before Lord Eldon, in the year 1820, in which Lord Eldon is reported to have said, "If one of the late king's physicians had kept a diary of what he heard and saw, this court would not, in the king's lifetime, have permitted him to print and publish it." And in the case of *Prince Albert v. Strange*, Lord Cottenham very decidedly expresses

MORISON v. MOAT.

his own opinion upon the subject. What he says, after going into the right of Prince Albert to the etchings,—the mode in which it came before Lord Cottenham being upon motion to dissolve an injunction which had been granted to restrain the publication of the catalogue of the etchings which had been prepared,—is this: His lordship, after dealing with the question as a subject of property, says, "But this case by no means depends solely upon the question of property; for a breach of trust, confidence, or contract would, of itself, entitle the plaintiff to an injunction."

The plaintiff's affidavits state the private character of the work or composition, and negative any license or authority for publication,—the gifts of some of the etchings to private friends certainly not implying any such license or authority,—and state distinctly the belief of the plaintiff, that the catalogue, and the descriptive and other remarks therein contained, could not have been compiled or made except by means of the possession of the several impressions of the said etchings surreptitiously and improperly obtained. To this case no answer is made, the defendant saying only that he did not at the time believe that the etchings had been improperly obtained, but not suggesting any mode by which they could have been properly obtained, so as to entitle the possessor to use them for publication. If, then, these compositions were kept private, except as to some given to private friends, and some sent to Mr. Brown for the purpose of having certain impressions taken, the possession of the defendant, or of his intended partner Judge, must have originated in a breach of trust, confidence, or contract, in Brown, or some person in his employ, taking more impressions than were ordered, and retaining the extra number, or in some person to whom copies were given, which is not to be supposed, but which, if the origin of the possession of the defendant or Judge, would be equally a breach of trust, confidence, or contract. *The Duke of Queensberry v. Shebbeare*, 2 Eden, 329. And upon the evidence on behalf of the plaintiff, and in the absence of any explanation on the part of the defendant, I am bound to assume that the possession of the etchings by the defendant or Judge has its foundation in a breach of trust, confidence, or contract, as Lord Eldon did in the case of Mr. Abernethy's lectures; and upon this ground, also, I think the plaintiff's title to the injunction sought to be discharged fully established. The observations of Vice Chancellor Wigram in *Tipping v. Clarke*, 2 Hare, 393, are applicable to this part of the case. He says, "Every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the plaintiff; and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract." He approves, therefore, of what fell from Vice Chancellor Wigram in *Tipping v. Clarke*.

Vice Chancellor Knight Bruce appears also to have concurred in

MORISON v. MOST.

opinion with Lord Cottenham in *Prince Albert v. Strange*. There is, therefore the concurrent opinion of Lords Eldon and Cottenham and of Vice Chancellors Knight Bruce and Sir James Wigram upon the question. By those authorities, in which I most fully concur, and which appear to me to agree in principle with many other cases to be found in the books, I must hold myself to be bound. It was much pressed in argument on the part of the defendant, that the effect of granting an injunction in such a case as the present would be to give the plaintiffs a better right than that of a patentee; and the case of *Canham v. Jones*, 2 V. & B. 218, was cited on the defendant's behalf. But what we have to deal with here is, not the right of the plaintiffs against the world, but their right against the defendant. It may well be that the plaintiffs have no title against the world in general, and may yet have a good title against this defendant; and the case of *Canham v. Jones* does not appear to me to touch the question. In that case the allegation was, not that the defendant was compounding the sirup according to the recipe, but that he did not know the recipe, and was compounding and selling a spurious preparation, falsely describing it under the title by which the true preparation was known, and thereby damaging the character of that preparation. The case, therefore, did not depend on any breach of confidence, for there was no confidence reposed, but depended wholly upon a supposed right of property in the medicine; and it is clear, from the judgment in that case, that the distinction between the case and a case like the present had not escaped Sir Thomas Plumer's attention, for he says, at page 221, "This bill proceeds upon an erroneous notion of exclusive property now subsisting in this medicine, which Swainson, having purchased, had a right to dispose of by his will, and, as it is contended, to give the plaintiff the exclusive right of sale of. If this claim of monopoly can be maintained without any limitation of time, it is a much better right than that of a patentee; but the violation of right with which the defendant is charged does not fall within the cases in which the court has restrained a fraudulent attempt by one man to invade another's property — to appropriate the benefit of a valuable interest, in the nature of good will, consisting in the character of his trade or production, established by individual merit; the other representing himself to be the same person, and his trade or production the same."

Then he says, "This is not that sort of case. The observation is correct, that the bill, stating the defendant's medicine to be spurious, asserts it not to be the same as the plaintiff's. The defendant does not hold himself out as the representative of Swainson, setting up a right in that character to the medicine purchased by him, but merely represents that he sells, not the plaintiff's medicine, but one of as good a quality. He is perfectly at liberty to do so. If any exclusive right in this medicine ever existed, it has long expired. The foundation of this bill, therefore, the exclusive right asserted by the plaintiff, failing, all the consequential relief falls with it, and the demurrer must be allowed." Such being the state of the authorities upon this subject, I have now to consider whether the circumstances of this case

Morison v. Moat.

bring it within the range of those authorities, and whether the court ought not to interfere by injunction, for which purpose it is necessary to examine the case as it has stood at several different periods. It does not appear to be disputed that James Morison was the inventor, and down to the 23d of June, 1830, the sole depositary of the secret in question. Upon the 23d of June, 1830, the partnership deed between him and Thomas Moat, and the two bonds to which I have referred, were executed; and the first question to be considered is, What was the effect of those instruments? It was contended, on the part of the defendant, that the effect of them was to constitute the secret an asset of the partnership; but looking at the deed alone, apart from the bonds, I am much disposed to think it could not have that effect; and taking the deed, as I think it must be taken, in connection with the bonds, I think it clear that it could not so operate. The question, I apprehend, is one of intention, like the question, whether there is a partnership in mines, or only in the minerals which are raised and manufactured by the parties working the mines; and this deed, I think, contains indications that the secret was not intended to belong to the partnership; for although it contemplated the introduction of new purposes, and expressly provides for the communication of the secret by James Morison to Thomas Moat, it leaves it at the option of James Morison whether he will communicate the secret to persons introduced either by himself or by Moat. Accordingly, the word "he," in the clause referred to, may apply to one or the other, (a point which is not material;) and it is difficult to conceive that a secret, which one partner had a discretion to withhold from others, could be intended to be a partnership asset.

Again: the clause as to accounts seems to look to matters which would properly, and without difficulty, be the subject of account, and not to such an asset as this secret would be. An account was to be taken upon a new partner coming in. Is it conceivable, that, if this secret had been contemplated as an asset of the partnership, there would have been no provision as to what should then be done respecting it?—no provision for valuing it, either then, or at the termination of the partnership? But, however this question might have stood upon the deed alone, the bonds seem to me to conclude it; for by Moat's bond he is not to communicate the secret to any person whomsoever; and by Morison's bond he is not to communicate it, except to persons whom he or Moat may introduce into the partnership, or for the purposes of the foreign trade. How, then, could it be in the contemplation of the partners that it should be an asset of the partnership, in which case it would be liable to be sold when the partnership determined? The true effect of these instruments appears to me to be this: that Morison reserved to himself the secret against all the world except Thomas Moat. Morison had power to introduce partners into the concern; Moat had the like power, with the concurrence of Morison, but not otherwise. It was entirely at the option of Morison whether he would communicate the secret to any partner, introduced either by himself or by Moat. Moat was absolutely bound not to reveal the secret to any person whomsoever. At this stage of

Morison v. Moat.

the case, therefore, there was, according to the authorities to which I have referred, a perfect right on the part of Morison, against Moat, to restrain him from divulging the secret. It is to be seen whether what has since passed has destroyed that right; and if not, whether the plaintiffs are entitled to enforce it against the defendant. The next stage in the case which we have to consider is the transaction of 1835.

At that time, both the plaintiffs had become partners in the concern, and the secret was communicated to them. Moat, who had been the acting partner, had fallen into bad health; and an agreement was entered into by all parties, that the defendant, the son of Moat, should come into the office as his father's servant; and by deed dated the 8th of August, 1835, and attested by Morison, the defendant was appointed to be a partner in the business after the death of his father, which occurred on the 11th of August in that year. But it is not pretended that Morison ever communicated the secret to the defendant, and the case does not appear to me to be at all altered by any thing which appears upon these instruments of 1835; for, if I am right in the conclusion at which I have before arrived, the fact of the defendant becoming a partner in the concern gave him no right to the knowledge of the secret, and certainly he could derive no such right from the agreement that he should come into the office as his father's servant. The language of the agreement, so far as it has any bearing upon the question, leads, I think, to the opposite conclusion; for it is that he is to transact the business as far as he is able so to do, not being a partner. These instruments, however, although nothing material appears on the face of them, have an important bearing on the case, for the defendant says that, under the provisions of the agreement, he attended the office and gained a knowledge of the ingredients used in the medicines; and that afterwards, having become a partner on the death of his father, he for two months superintended the business in common with his copartners, and during that time saw the mode and manner of compounding the medicines and the ingredients thereof, and the proportions in which such ingredients were used, and acquired a complete practical knowledge of the mode of compounding and mixing them; and it is insisted, on his part, that he has the right to use that knowledge. Undoubtedly, if the facts thus stated by the defendant be proved—if the defendant, after he became a partner in the concern, openly took part in compounding the medicines, and used the secret for the purpose—if, with the knowledge and concurrence of his partners, he was permitted to acquire, and did acquire, a full knowledge of the mode of compounding these medicines, and of the secret process in the manufacture of them, it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired, or any secret so disclosed. They would, I think, in such a state of circumstances, be considered to have waived any right to preserve the secret for their separate benefit.

But how does the evidence stand upon these facts? Both the plaintiffs have denied on oath the statement of the defendant, as to

Morison v. Moat.

his having superintended the business and acquired a knowledge of the process; and it is in evidence, that, in the course of manufacturing these medicines, some ingredients are introduced at a late stage of the process; that these ingredients have always been kept in a closet in a room set apart for mixing the medicines; that the key of this room was always kept by James Morison or the plaintiffs; that it was by them, or one of them, the later ingredients were always introduced, and that the defendant never took part in compounding the medicines. These facts are sworn to by several workmen, and there is no attempt on the part of the defendant to dispute them, beyond the general allegations which I have stated from his affidavit. Independently of the conclusion to be drawn from the acts of the defendant, to which I shall presently advert, there is a collateral fact which confirms the statement of the workmen; for it appears that, immediately after the death of Thomas Moat, a door which led from the house in which he resided, and in which the defendant continued to reside after his death, to the mixing-room, was locked up.

And in this state of the evidence I am bound, I think, to conclude, that if the defendant did, in fact, after he became a partner in the concern, acquire by practice the knowledge of the mode of mixing these medicines, (but which I do not believe he did,) he acquired that knowledge surreptitiously, and without the sanction of his partners. The case, then, in this stage stands thus: The defendant admits that the secret was communicated to him by Thomas Moat. His allegation, that he acquired a knowledge of it by acting as partner in the concern, is disproved; and it is shown that, if he did so, he did so surreptitiously. The question then is, whether there was an equity against him; and I am of opinion that there was. It was already a breach of faith and of contract on the part of Thomas Moat to communicate the secret. The defendant derives it under that breach of faith and of contract, and I think he can gain no title by it. In *Green v. Folghamb*, upon a trust admitted, an account was directed against the party to whom the secret was divulged; and it cannot, I think, make any difference whether the trust is admitted or proved. And the cases of *Tipping v. Clarke* and *Prince Albert v. Strange* show that the equity prevails against parties deriving their knowledge under the breach of contract or duty. It might, indeed, be different if the defendant was a purchaser for value of the secret, without notice of any obligation affecting it; and the defendant's case was attempted to be put upon this ground. It was said that, as appointee, he came in as purchaser under the deed of the 23d of June, 1830, and that he had no notice of the bond; but I do not think that this view of the case can avail him, for, in whatever character he may stand as appointee, he has no constitutional right in the secret. So far as the secret is concerned, he is a mere volunteer, deriving his title under a breach of faith or of contract. There having been, then, this equity against the defendant, has it been displaced by what has since occurred? The defendant contends that it has, for he says that the deed of 1837 was entered into with full knowledge on the part of the plaintiffs and of James Morison that he had possession of the secret. He has proved, I think,

Morison v. Moat.

sufficient to show that the fact of his having become a sleeping partner under that deed furnishes no inference against such knowledge, there having been other disputes between the parties; and, for proof of such knowledge, he relies on the covenant in the deed against divulging the secret having been made applicable to him. These alleged conversations, and the covenant in the deed, which is of more importance, are, I apprehend, to be regarded as evidence of the knowledge imputed by the defendant to the plaintiffs and their father, and to be weighed against the other evidence in the cause; and, in determining the weight due to the evidence on the part of the defendant, it is material to be observed that he nowhere states that he told the plaintiffs and their father that he had possession of the secret, and that he gives no detail of the conversations to which he refers.

On the other hand, there is a denial by the plaintiffs of any such conversations with them, and, to their belief, with James Morison; and the grounds of the denial are stated, and are not controverted by the defendant. There is also the fact, that, if the plaintiffs and their father had known that the defendant was in possession of the secret, there appears to be no reason why he should not have participated in the business of mixing of the medicines, which I consider it to be proved that he did not; and there is, besides, the conduct of the defendant at a subsequent period, to which I shall have occasion next to refer. These facts, in my opinion, far outweigh the defendant's statement as to the conversations and the covenant in the deed, which might well be inserted by way of precaution; and I think, therefore, that the defendant's case, upon the deed of 1837, cannot be supported. If the covenant in the deed was inserted to protect against the defendant divulging a knowledge which he was known already to have acquired, surely the fact of his having acquired that knowledge would have been recited in the deed. We come now to the death of James Morison, who died in May, 1840. Soon after his death disputes arose between his executors, the widow and administratrix of Moat, and the surviving partners; and these disputes were compromised upon the terms, amongst others, of an annuity of 100*l.* a year being paid to the widow of Moat out of the profits of the business, so long as the business continued, and out of the proceeds of the sale of the secret, if it should be sold under the trusts of Morison's will. The deeds were executed for carrying into effect this compromise, and each of those deeds recited the will of Morison, with the recital contained in it that he was the inventor and sole proprietor of the medicine, and with the trusts for sale of the secret declared by it, and by one of those deeds the annuity was secured in the manner above mentioned. The defendant was a party to each of those deeds; and it is clear, therefore, that he did not claim any right or interest in the secret adverse to the title under the will of Morison.

Nothing further appears to have occurred until the determination of the partnership, except that, in 1846, the defendant, through his solicitor, complained of a paper which had been published by the plaintiffs in America, containing a statement to the effect that Thomas Moat had not revealed the secret, and distinctly stated that he was in

Morison v. Moat.

possession of it, but nothing ensued upon the complaint; and, the partnership being still then subsisting, it is difficult to see what could, upon either side, have been done upon it. Upon the determination of the partnership on the 25th of March, 1851, the stock was divided, but this was according to the provisions of the partnership articles, and, therefore, could not affect the rights of either party. The defendant, by his affidavit, attempts to set up a further case, upon the ground that great expenses have been incurred in advertisements, and that this will be for the benefit of the plaintiffs alone, if he be not permitted to carry on the business; but I do not think he can maintain his case upon this ground — it has been the practice of the partnership, and he and his father have had the benefit of it during its subsistence. The last point urged on the defendant's behalf was the delay on the part of the plaintiffs; but I think there has been no such delay as disentitled the plaintiffs to the interposition of the court, for at the dissolution of the partnership the defendant had distinct notice that his claim would be resisted; and there has since been the question with the stamp office, the suit in this court, and, as it would appear, some negotiation for a compromise. And besides, the defendant had clearly the right to sell the medicines and use the labels allotted to him at the termination of the partnership. Upon the whole, therefore, I am of opinion that the plaintiffs have made out their case for an injunction. I think, however, that the injunction cannot go to the extent which is asked for by the notice of motion. It should, I think, go to the extent of restraining the defendant from selling, under the title or signature of "Morison's Universal Medicine," any medicine made or manufactured by him — proceeding to this extent, not upon the mere use of the name, but because this is clearly the mode in which the defendant is availing himself of the breach of faith and contract. And upon the authorities, and particularly upon *Yovatt v. Winyard*, I think it should also go to the extent of restraining the defendant from making or compounding any medicines according to the secret in the bill named, and from in any manner using the secret of compounding the said medicines, or any part thereof; but I cannot grant it to restrain the defendant from in any way or manner using the name of Morison in the manufacture or sale of any medicine, as, in my view of the case, it would very much depend on the purpose for which, and the mode in which, the name may be used, whether the injunction would be due or not. Nor can I grant it to restrain the communication of the secret, there being no evidence, or even allegation, of an intention to communicate it. The order, therefore, that I shall make will be for an injunction to restrain the defendant, his agents, servants, and workmen from selling, or causing or procuring to be sold, under the title or designation of "Morison's Universal Medicine," any medicine made or manufactured by him, the said defendant, or by and under his order or direction; and also to restrain the defendant, his agents, servants, and workmen from making or compounding any medicines according to the secret in the said bill mentioned, and from in any manner using the secret of compounding the said medicines, or any part thereof.

Philps v. Evans.

Shapter. Do you say any thing about the costs, sir?

SIR GEORGE TURNER, V. C. No; certainly not. It is understood that I do not send the case to law, but proceed on the equity of the case.

Shapter. Then the costs will be reserved?

SIR GEORGE TURNER, V. C. Where there is an order made, the costs are costs in the cause.

PHILPS v. EVANS.¹

December 5, 1850.

Will—Construction—“Personal Representative”—“Next of Kin.”

A testatrix gave personal estate to her sister for life, for her separate use, with remainder over among her nieces, with remainder, in case of the nieces dying without having had any child, “to the personal representatives or next of kin” of the testatrix’s father:—

Held, that the next of kin at the death of the testatrix were the persons entitled.

THE testatrix, Ann Tutin, by her will, dated the 14th of July, 1796, bequeathed unto Jeremiah Bigsby and Francis Evans, their executors, administrators, and assigns, all her personal estate, upon trust to receive the same, and to place the moneys to arise thereby out at interest, and to pay the clear yearly dividends, interest, and produce to her sister, Elizabeth Gelstharp, for her life; and after the decease of her said sister, to pay the said interest and dividends to her niece, Elizabeth Gelstharp, for her life; and after her decease, to deliver all such moneys unto the issue, child or children, of her said niece, Elizabeth Gelstharp, as in the will mentioned; and in default of such issue, upon trust for the testatrix’s niece, Catherine Tutin, for her life; and after her decease, for the issue, child or children, of the said Catherine Tutin, as in the will mentioned; and in case the testatrix’s said sister should not be living at the time of the decease of the survivor of the testatrix’s said two nieces, Elizabeth Gelstharp and Catherine Tutin, without such issue as aforesaid, in trust to deliver and pay the same unto and amongst the personal representatives or next of kin of the testatrix’s late father, Edward Tutin, their executors, administrators, and assigns. And the said testatrix appointed her said sister, Elizabeth Gelstharp, the said Jeremiah Bigsby, and F. Evans, joint executrix and executors of her said will. The will was proved on the 24th of October, 1796. Catherine Tutin and Elizabeth Gelstharp the niece survived Elizabeth Gelstharp the sister; and Catherine Tutin died in September, 1824, without having been married, and Elizabeth Gels-

¹ 15 Jur. 809.

 Grove v. Young.

tharp the niece, died on the 11th of January, 1848, without having been married. The question in dispute was, whether the persons entitled under the last limitation in the will were the next of kin of Edward Tutin at the death of the testatrix, or the next of kin at the death of Elizabeth Gelstharp the niece, the surviving tenant for life.

Metcalf, for the plaintiff. The class is to be ascertained at the death of the testatrix. *Bird v. Luckie*, 14 Jur. 1015.

De Gex, for the next of kin at the death of the tenant for life, Elizabeth Gelstharp. This case is distinguishable from *Bird v. Luckie*, because here the next of kin are not the next of kin of the testatrix, but the next of kin of another. [He cited *Clapton v. Bulmer*, 5 My. & C. 108; *Beck v. Burn*, 7 Beav. 492; *Say v. Creed*, 5 Hare, 580; and *Miller v. Eaton*, Coop. 272.]

M. Archer Shee, for the trustees.

Knight Bruce, V. C. This case differs from those relied upon by the plaintiffs, in the circumstance that the next of kin are those, not of the testatrix, but of another person. That is not, however, in my opinion, sufficient to distinguish it in principle from them; and having recently considered all these cases in the latest one referred to, I shall give a similar decision in this in favor of the next of kin at the time of the testatrix's death.

 GROVE v. YOUNG.¹

December 16, 1850.

Heir at Law — "Devisavit vel non."

It is at the option of the heir at law to have the validity of a will tried in an action of ejectment, or by an issue *devisavit vel non*.

In this case, an action had been brought by the heir at law against the surviving devisee in trust for sale under the will, for the purpose of trying the validity of a will, the same being disputed by the heir at law. The form of the action was for money had and received. A verdict was found in favor of the devisee, and an application by the heir at law for a new trial of the action was refused by the Court of Common Pleas.

Roundell Palmer and *Beales*, for the heir at law, asked that an ejectment might be directed to be brought, accompanied by admissions, the heir at law requiring further investigation at law, and desiring that it should not be obtained under an issue *devisavit vel non*.

¹ 15 Jur. 810.

Allfrey v. Allfrey.

Malins and *Rasch*, for the devisee, objected to the point being tried in an action, contending that the heir at law was only entitled to have an issue *devisavit vel non*, if he were entitled at all to any further investigation, after a verdict found against him.

KNIGHT BRUCE, V. C. It must appear in the decree that the heir at law elects to bring an ejectment rather than an issue *devisavit vel non*. I am of opinion that he is entitled to have such an action rather than an issue, especially according to the modern course of decision.

ALLFREY v. ALLFREY.¹

June 25, 1851.

Impertinence.

The defendants, in their third further examination before the master, annexed five schedules to their examination, in which a large mass of matter set forth in their previous examinations was repeated:—

Held, that the repetitions were impertinent; and it was referred to the master to expunge them.

By the decree made in the cause, dated the 28th of May, 1847, (see 11 Jur. 981,) it was declared that the plaintiff was not bound by the settlement of accounts of the 7th of May, 1825, and the 11th of January, 1828, in the pleadings mentioned, with Edward Allfrey, deceased, the administrator of George Allfrey, deceased, the intestate therein named; and that such accounts ought to be opened; and it was referred to the master to take the usual accounts of the intestate's real and personal estates, with certain special directions; and the parties were to be examined upon interrogatories as the master should direct. On the 28th of May, 1849, the master allowed interrogatories for the examination of the defendants, George Allfrey, Margaret Allfrey, and Robert Allfrey. On the 30th of July, 1849, the defendants put in their examination to the interrogatories. On the 5th of February, 1850, the master certified that the examination was not sufficient as to any one of the interrogatories, and that he had allowed the defendants four weeks' further time to put in their further examination. On the 20th of April, 1850, the defendants filed a further examination. On the 14th of June, 1850, the master certified that the further examination was insufficient as to certain interrogatories, and he allowed the defendants twenty-one days to put in a further examination. On the 9th of July, 1850, the defendants filed their third examination. On the 29th of July, 1850, the master certified that this examination was also insufficient as to certain interrogatories. On the 30th of July, 1850, the defendants filed exceptions to the

¹ 15 Jur. 831.

Allfrey v. Allfrey.

master's certificate. On the 6th of March, 1851, the exceptions came on for hearing, and were overruled by Lord Langdale, M. R. On the 10th of April, 1851, the defendants, after having obtained a month's further time, filed their fourth examination. This examination repeated the schedules in the former examinations, with a few additions and variations; and the plaintiff, considering this examination to be impertinent, took out a warrant before the master, under the 73d general order of the 3d of April, 1828, for the master to examine the fourth examination, and to expunge such portion of it as might be impertinent. The master decided that the fourth examination was not impertinent, and on the 5th of June, 1851, signed his certificate to that effect; but, in pursuance of the 23d general order of the 21st of December, 1833, and the 12th general order of the 26th of October, 1842, he referred it to the taxing master to say what extra costs had been incurred by any unnecessary prolixity in the first, second, third, fourth, and fifth schedules of the fourth examination, (which was in the certificate called the third further examination,) and he directed such extra costs to be paid by the defendants. On the 16th of June, 1851, the plaintiff filed eleven exceptions to the master's certificate. First, that the master had, in and by his certificate, found that the third further examination of the defendants was not impertinent, when he ought to have found the same impertinent, as regarded so much of the first schedule thereunto as consisted of mere repetitions or restatements, without any variation or alteration of matters in the first schedule annexed to the further examination of the defendants. Secondly, that the master ought to have found the said third further examination impertinent, as regarded so much of the second schedule thereto as consisted of mere repetitions or restatements, without any variation or alteration of matters in the second schedule annexed to the further examination of the defendants. Thirdly, that the master ought to have found the third further examination impertinent, as regarded so much of the third schedule, thereto annexed, as consisted of mere repetitions or restatements, without any variation or alteration of matters in the third schedule to the said further examination. Fourthly, that the master ought to have found the third further examination impertinent, as regarded so much of the fourth schedule, thereto annexed, as consisted of mere repetitions or restatements of matters in the fifth schedule to the further examination of the defendants. Fifthly, that the master ought to have found the third further examination impertinent, as regarded so much of the fifth schedule thereto as consisted of mere repetitions or restatements of matters in the sixth schedule to the further examination of the defendants. The next five exceptions were to the effect, that the master ought to have found that the schedules annexed to the third further examination were impertinently set forth. The eleventh exception was, for that the master had, in and by his certificate, certified, in pursuance of the 23d of the general orders of the 21st of December, 1833, and the 12th of the general orders dated the 26th of December, 1842, that he had referred it to the taxing master to say what extra costs had been incurred by any unnecessary prolixity in the first, second,

Allfrey v. Allfrey.

third, fourth, and fifth schedules of the third further examination, and had directed such costs to be paid by the defendants. The first schedule of the third further examination contained a repetition of about twenty folios. The second schedule contained only two new items out of 331, and four alterations, and a repetition of about fifty folios. The third schedule contained only three new items out of 421, and four items amended, and a repetition of about sixty-four folios. The fourth schedule contained three new items out of ninety-six items, and seven alterations. The fifth schedule contained two new items out of 123, and four alterations. The fourth schedule to the further examination, containing a statement of the intestate's real estates, was omitted from the third further examination.

Walpole and *Rasch*, for the exceptions, contended that the third further examination was oppressive and impertinent in respect of the needless repetitions it contained, and that it would have been quite sufficient if the defendants had merely annexed to the examination a schedule of the additional items, and their amendments of the previous schedules. The reference directed by the master was quite inadequate as a remedy to the plaintiff, inasmuch as the taxing master would only allow 2*l.* 14*s.* for the payment of the office copy of the items repeated, and not the costs of the reference; and that the master had in fact no authority, under the general orders referred to by him, to direct the reference. They contended that the impertinent matter ought to be expunged.

Roupell and *H. Clarke*, *contra*, contended that it was more convenient to set forth the examination in the manner adopted, and that it was not impertinent.

The following cases were referred to: *Bacon v. Kent*, 3 De G. & S. 207; *Parker v. Fairlie*, Turn. & R. 362; and *Rickards v. The Attorney General*, 12 Cl. & Fin. 30.

SIR JOHN ROMILLY, M. R., (without hearing a reply,) said: I have no doubt whatever about this case. It is of the greatest possible importance to keep the records of the court perfectly clear from any unnecessary statement. I fully concur in the correctness of the cases referred to, as to the propriety and necessity of the court having a case clearly proved in matters of importance, and that the court, where there is doubt, should allow the matter complained of as impertinent to remain till the hearing or ultimate determination of the cause, in order that it may be seen whether the matter can be material or not. But where the court sees clearly that the matter is impertinent, it is the duty of the court at once to strike out the impertinent matter.

Now, I am of opinion that, in this case, it is clearly impertinent to repeat over again, in exactly the same words, the same items in the same document. It is of the greatest importance, considering the necessary length and the necessary prolixity of documents in this court, for the purpose of enabling parties to put the whole of their

Allfrey v. Allfrey.

case properly before the court, where the case is clear, to keep the parties within proper and necessary limits and bounds. It appears to me that this is undoubtedly a case in which the party ought to be visited with the costs of the impertinent matter. But the only way in which costs can be properly visited against a person who sets forth an impertinent statement is by striking it out, in order that the costs may be paid in the first instance, and, which is of still more importance, that in the future stages of the cause the parties may not be burdened with the expense necessary for the repetition of these useless statements.

Again: if the case were referred to the taxing master here, to say what extra costs had been incurred by any unnecessary prolixity, he possibly might be of opinion that there was no unnecessary statement; and then there might be exceptions to his certificate, and the whole matter brought before the court in that form. Many reasons have been stated why I ought not to allow these exceptions. The first of them, though it shows me that this case is attended with very considerable pain, and probably a good deal of hostility between the parties, is not a matter which it is possible for me to attend to. It is said to be a great hardship to have a suit instituted forty or forty-one years after the death of the intestate, to impeach accounts which have been settled eighteen years, I think, before the bill was filed. Upon that I can exercise no judgment at all; the court has pronounced its decree, and that decree has been affirmed upon appeal. Assuming that decree to be as erroneous as it is possible to conceive, I have no jurisdiction in the case, but must treat it exactly the same as if it was the strongest and most proper case that could be brought before the court; in saying which, I do not mean, of course, to suggest the slightest hint that the decree was not a right one, and that I should not have come to exactly the same conclusion. Then it is said that the decree has been very oppressively worked, and that this is shown, because, in the first place, when these accounts were put in, and the documents were not set forth, exceptions were taken on that ground; and when the accounts were set forth, another exception was taken because one document was omitted; and again, when the examination was put in, a third exception was taken because all the documents were not referred to. All these matters are matters which it is totally impossible for me to regard in the slightest degree, because they are not matters which come before me on the present occasion. I have no power whatever of saying whether the exceptions for insufficiency were proper or not. I am bound to assume that they were proper, and that the court came to a right conclusion when it decided that those exceptions for insufficiency ought to be allowed.

Then this fourth examination is put in, and in this fourth examination is repeated every thing that appears to be contained in the former examinations; and it contains some further statements and matters, which, it is said, make one entire and consistent whole. It is said that it was for the benefit of the plaintiff to have this done; and possibly that might be true if it had been done at first, and the

Allfrey v. Allfrey.

first examination put in in this form. But it is no excuse for the defendants to say that it is for the benefit of the plaintiff to have it in one form; if, in truth, he has been dealing out in dribblets the information he possessed, or might by reasonable care and attention have possessed in the first instance. Again: it is said that this information might have been obtained from the books, and that this is very oppressive. As I have already stated, I cannot go into that; but, assuming it to be oppressive, an oppression on the part of the plaintiff will not justify a similar course on the part of the defendants; and, so far as it lies in my power, I will endeavor, if any future proceedings come before me in the suit, to keep both parties within the rules which I think are necessary for the purpose of doing justice in the cause. It is said that the repetition is not of the same document, and that there is no case in which repetition has been treated to be impertinent, where it has been a repetition of some statement contained in another and a different document; and it is suggested, that if, in the examination, the defendants had repeated over again what was in the answer, that would not have been impertinent; and I concur in that; but I think that a further examination is to be treated as part of the same document as the original examination. I consider that all these examinations do, in fact, form but one. When an answer is put in to a bill in chancery, and exceptions are taken to it, the further answer and the original answer form but one answer together, but one record in fact; and if, upon pretence that it was convenient to the defendant to have all the documents together in one answer, a defendant thought fit, in a further answer, to repeat every word which he had stated in the answer to the original bill, and exceptions were taken, the court would very properly expunge from the further answer the whole of that which was in the first answer. I consider this to be exactly the same thing, and I consider that the fact of there being two or three examinations, one after the other, makes no difference in that respect, but that they must be treated and read as one document. Another excuse is, that it is material for the defence to have it altogether; and it may be useful that the defendants should have it all in one document. But if they have given insufficient information in the first instance, and have afterwards, upon two subsequent occasions, not given the fullest information, they cannot, upon the ground that it may be useful to them upon the concluding occasion, when they are compelled to give a complete and sufficient answer, repeat over again any thing that they put in the former examinations. It is urged, that if there be struck out from this examination those parts which are impertinent, the result will be, that the whole will be inconsistent or unmeaning; that it will be impossible to tell what construction is to be put upon it; and that an indictment for perjury would not lie upon it, because it would not be the document sworn to. I am of opinion that that is no excuse. I have known in my own practice this case occur: A bill filed, which was excepted to for impertinence, and which bill, as it stood, was undoubtedly impertinent, and the court thought fit

Allfrey v. Allfrey.

to strike out a considerable portion of it; but the bill undoubtedly was not demurrable, but the passages which the court objected to as impertinent, and struck out as impertinent, which were expressly specified from one line to another line, left the bill nonsensical, and the pleader did not alter the bill; upon which the defendant put in a demurrer to the bill, which the court allowed, on the ground that it was a consequence produced by the plaintiff, by his own misconduct in setting forth impertinent matter. And in this case, when the impertinent matter is struck out, the defendants may have to reform their examination, in order to make it complete and consistent, and make it such as can properly be an examination to meet the interrogatories, omitting the impertinent matter; and it may be necessary for them, in that respect, to take some steps for that purpose. And undoubtedly the court will take very good care that they shall not be oppressively dealt with by reason of striking out those passages, and leave will be given to them for the purpose of doing every thing that is necessary to set their examination right. It is said that the effect of that may be to make the examination insufficient; and if the passages are simply struck out, that may be the effect; but the defendants may be allowed to amend their examination, for the purpose of making it such as it ought to be after the passages are struck out. I think that these passages are impertinent, and must be struck out of the schedules. But, in making an order to that effect, I am very desirous that the passages which I propose to strike out should be distinctly pointed out. I propose to strike out all those passages from the schedules which are actual repetitions of those which appeared in the former schedules. The principle upon which I proceed being understood, there will not be any very considerable difficulty in framing the order distinctly upon that point. The master will strike out those passages which I think are impertinent, and the defendants must pay the plaintiff such costs as have been incurred by the introduction of those passages; but there will be no costs of these exceptions.

The first five and the eleventh exceptions were allowed, and no order was made on the rest. The order, as drawn up, specified the particular parts of each schedule which the master was to strike out.

Anderton v. Yates.

ANDERTON v. YATES.¹

December 14, 1850.

Notes of Counsel — Time for filing Affidavits.

The court will act upon notes on counsel's briefs if they agree, although no entry or corresponding minute appears in the registrar's book.

Affidavits will be received, although filed after a time appointed, if a failure of justice or great inconvenience would be occasioned by their rejection.

A PETITION in this case came on to be heard on the 18th of November, when it was arranged that all affidavits should be filed on or before the 21st, and that the petition should stand over. No minute of this arrangement as to filing the affidavits appeared in the registrar's book, but counsel on both sides noted the same on their briefs. Affidavits were filed on both sides after the 21st of November. The petition now came on to be heard.

Malins and *C. M. Roupell*, for the petition, proposed to read the affidavits.

Wigram and *Selwyn*, for the principal respondents, objected.

Surrage, for another party to the suit.

Knight Bruce, V. C. I have communicated with Lord Cranworth, who is of opinion, as I am, that I should act upon the notes of counsel, which all agree, notwithstanding that no entry of this arrangement appears in the registrar's book. As to the admission of the affidavits, *prima facie* affidavits, filed after the appointed time, must be rejected. That is consistent with the rule and practice of the courts. If it is desired that affidavits should be filed after the time, the course is to make application to the court for leave to do so. Lord Cranworth, however, agrees with me in opinion, that the court has a discretion to admit affidavits filed after the time, if a failure of justice is likely to occur by reason of their rejection, or if great inconvenience would ensue. I should have pursued that course if such a case had been shown; but I consider that it will be favorable to justice that these affidavits should be rejected, and I reject them accordingly. I will not direct the affidavits filed after the 21st of November to be taken off the file, as they may be useful hereafter, but the petition must proceed without them. As to costs, I shall reserve them.

The petition, which was for a reference to the master to appoint a guardian, was then heard, and an order made thereon.

¹ 15 Jur. 833.

In re The Godmanchester Grammar School.

In re THE GODMANCHESTER GRAMMAR SCHOOL.¹

December 14, 1850.

Stat. 3 & 4 Vict. c. 77 — Sir Samuel Romilly's Act — Attorney General's Certificate — Jurisdiction.

Where a petition is presented under Sir Samuel Romilly's Act, and in the matter of the act 3 & 4 Vict. c. 77, the court has jurisdiction to make a declaration as to the dismissal of a master of a grammar school, although the attorney general's certificate is not obtained, the court having previously made order for the management of the school under Sir Samuel Romilly's Act.

THIS was a petition presented by the vicar of Godmanchester, in Huntingdonshire, in the matter of the grammar school there, and of the statute called "Sir Samuel Romilly's Act," and of the stat. 3 & 4 Vict. c. 77, which stated that Mr. Richard Gaunt was appointed head master of the school (which was established by a charter of Queen Elizabeth) in the month of January, 1808, which office he held until the 31st of July, 1850; that on the 21st of March, 1850, the governors of the school resolved on the removal of Mr. Gaunt from the mastership, on account of his permanent incapacity to perform the duties of the office, and they directed that three months' notice should be given him of that determination, and to vacate the mastership, and give up the school-house and premises; that Mr. Gaunt had refused to give up the mastership, or to vacate the school-house and premises; that, by the 19th section of the stat. 3 & 4 Vict. c. 77, provision was made for recovering, in a summary manner, before justices of the peace, premises belonging to grammar schools, on the production of an order of the Court of Chancery, declaring the master of such grammar school to have been duly dismissed, or to have ceased to be master. The petition therefore prayed, that the court would make a declaration that Mr. Richard Gaunt had been duly dismissed and removed from the mastership of the Godmanchester Free Grammar School, and had ceased to be the master thereof.

Kenyon, for the petition. The sanction of the attorney general by his certificate has not been obtained, because it is apprehended that, as this matter has formerly been before the court under Sir Samuel Romilly's Act, and orders have been made for the management of the school under that act, such certificate is not now necessary, and such is the opinion of the lord chancellor's secretary. The petition being in all respects regular, the order is asked for.

KNIGHT BRUCE, V. C. I suppose the jurisdiction of the court has been sufficiently fixed by the former orders.

Terrell, for the master, asked for a retiring pension for his long

¹ 15 Jur. 833.

In re Cook.

services of forty-two years, which, under the 18th section of the act of Victoria, could be granted.

Kenyon, in reply. The funds are too small to admit of any retiring pension. The proviso of the 18th section is, "Provided that there shall remain sufficient means to provide for the efficient performance of the duties which belong to the office from which such master shall be removed."

KNIGHT BRUCE, V. C. I appear to have no discretion in the case but that I must make the declaration asked; and I make it accordingly.

*In re Cook.*¹

May 10, 1851.

Guardian — Infant — Mother.

The court will not appoint a mother to be the guardian of her children without having some information as to the family of the father.

SHAPTER stated that this was the petition of two infants, praying that the income of two sums of 95*l.* might be paid to their mother, and that their mother might be appointed their guardian. The father of the infants was dead, and the children were living with their mother. He further stated, that the parties were in very humble circumstances, and that it was desired that the appointment of the mother as guardian should be made without a reference, and that the estate would not bear the expense of an inquiry.

KNIGHT BRUCE, V. C. In no rank of life will I appoint the mother the guardian of her children without having some information as to the father's family. I cannot accede to that part of the petition. I have, however, no objection to make an order for the payment of the income to the mother. So far, the order may go; but as to the other part, I must be informed.

¹ 15 Jur. 836.

 Whitfield v. Parfitt.

WHITFIELD v. PARFITT.¹

February 18, 1851.

Ship Registry Acts — Bill of Sale — Mortgage — Indorsement — Redemption — Costs.

A party, entitled to eight sixty-fourths of a ship, transferred them to another by a bill of sale, on which was indorsed, that if the transferor should pay to the transferee 100*l.* and interest, the bill of sale should be void. Interest was subsequently paid on the money. The bill of sale was registered, but no notice was taken in the registry of the indorsement. The transferee sold to a third party, and the original transferor filed a bill against the others to redeem; and a decree was made in his favor, and with costs, so far as they were occasioned by the denial or dispute of his right to redeem.

THIS was a suit instituted for the redemption of eight sixty-fourth shares in a certain steamtug, called the "Stockton," registered at the port of Bristol. It appeared by the evidence, that in the month of March, 1845, the defendant Parfitt lent to the plaintiff 100*l.*, and it was agreed that the repayment should be secured by an assignment of the eight sixty-fourth shares in question. A bill of sale was accordingly prepared, dated the 2d of April, 1845, purporting on its face to be an absolute bill of sale, but there was indorsed on it a memorandum, also dated the 2d of April, 1845, to the effect, "that on the plaintiff repaying to Parfitt the sum of 100*l.*, and interest at 5*l.* per cent., then and in that case the bill of sale should be null and void, and of no effect whatever." This memorandum was signed by the plaintiff, and by the wife of the defendant Parfitt for him. In the month of January, 1846, the plaintiff paid to the defendant the interest due on the 100*l.*, and the defendant gave him a receipt for such interest. In July, 1846, the defendant procured the bill of sale to be registered, and the entry on the certificate of registry took no notice whatever of the indorsement, but treated the instrument as an absolute transfer. The plaintiff, hearing of this, made application to the custom-house authorities on the subject, but, being unable to produce the bill of sale, which was in Parfitt's possession, without effect. In the month of October, 1846, Parfitt transferred, by bill of sale, to John Jones, of Bristol, the other defendant; whereupon the plaintiff filed his bill for redemption, and for an injunction to restrain the registry of the transfer to Jones. The injunction was obtained, and the cause now came on for hearing.

Swanston and Roxburgh, for the plaintiff. The plaintiff's right to redeem, as against Parfitt, is not in any manner affected by the ship registry acts, inasmuch as the transfer, which has been registered, was a deed which never existed, for the document which was executed, and which ought to have been registered, is to all intents a mortgage, and nothing more. The case of the defendant Jones is, at all events, no better than that of Parfitt, for it is not pretended that he has

¹ 15 Jur. 852.

 Whitfield v. Parfitt.

completed even a legal title by registry. *Boyson v. Gibson*, 4 C. B. 121. *Ex parte Jones*, 2 Cr. & J. 513. *Follett v. Delany*, 2 De G. & S. 235. Also the 37th, 38th, and 45th sections of the 8 & 9 Vict. c. 89.

Chapman Barber, for the defendant Parfitt. Although the transaction was originally a loan, it was the intention of the parties that the bill of sale should be absolute. The wife had no authority to sign the indorsement for the defendant. The registry is conclusive evidence of the defendant's title. *Mestaer v. Gillespie*, 11 Ves. 621

Osborne, for the defendant Jones. The transaction was an absolute sale, and Jones has a right to look upon the registry, and that only, as evidence of Parfitt's title to sell; and he may rely, as he does rely, on the plaintiff's laches in allowing the registry to remain unaltered between July and October. *Battersby v. Smyth*, 3 Mad. 110.

Swanston was not called on to reply.

Knight Bruce, V. C. The first question is, whether the bill of sale, and the indorsement upon it, are to be taken as contemporaneous instruments, or contemporaneously signed by those who signed those instruments, if the word "instruments" can properly be used in the plural. I am of opinion that, upon the evidence, they must be taken to be so. The next question is, whether, inasmuch as the indorsement was signed, not by the defendant Parfitt, but by his wife, it is to be taken, on this evidence, (including especially the receipt,) that she signed it as his agent and upon his authority. I am of opinion that the just and inevitable inference from the evidence is, that she did sign it as his agent and by his authority. That being so, the case stands in the same position, in my judgment, as if the memorandum or indorsement had been signed by Mr. Parfitt himself. The next consequence that follows is, that, in my judgment, the indorsement is as much a part of the deed upon which it is written as if it had been inserted in the front of the papers, in the middle, or in any other part of the deed. Supposing that view of the case to be correct, the instrument is, to all intents and purposes, a mortgage. It has, however, been registered and entered in the custom-house books in such a form as not to mention whether it is a sale or a mortgage; and a bill of sale may be a description of a conveyance or assurance as applicable to a transaction which is not a sale, in the colloquial sense of the expression, as to one that is; and the question is, whether the circumstance that it is not mentioned in the manner that I have stated, as a mortgage or a security for money, is to invalidate the transaction. I am of opinion that that cannot be contended for successfully upon any part of the act of Parliament, unless on the 45th section; and I am also of opinion that the 45th section was not intended to invalidate, and does not invalidate, such a transaction. There are two views of this case: one, that, the act not having been obeyed, the legal interest never has been effectually taken out of the plaintiff. If that is the fair view, which I do not say, the plaintiff nevertheless has

Walworth v. Holt; and in re The Imperial Bank of England.

a right to come here, he submitting to redeem, for the purpose of taking the cloud off his title. If, however, the legal interest has been taken out of him, then I say it has not been so taken out of him as by law to exclude his right of redemption. The case of Jones has not a right to stand higher than that of Parfitt. The consequence is, that there must be redemption upon the usual terms, except that, as to the costs occasioned by denying or disputing the right of redemption, those costs must be separated, and paid to the plaintiff: the one set must be placed against the other. I think that the law has been too much for dishonesty in this case. I continue the injunction, because I think it fit in the present state of circumstances.

WALWORTH v. HOLT; and in re THE IMPERIAL BANK OF ENGLAND.¹

May 3, 1851.

Costs — Joint-stock Companies Winding-up Acts.

A suit was instituted before the passing of the Joint-stock Companies Winding-up Acts, for the winding up the affairs of a company. The bill was dismissed, with costs, as against some of the defendants. An order was afterwards made under the Joint-stock Companies Winding-up Acts for the winding up of the company's affairs, and the official manager petitioned to have the money in court in the suit paid to him. The defendants, against whom the bill had been dismissed, with costs, appeared, although not served with the petition, and asked for payment of those costs out of the fund, on the ground that they had no means of getting them from the plaintiff; and the court ordered those costs, and also their costs of appearing on the petition, to be paid out of the fund accordingly.

THIS was the petition of the official manager, appointed under the Winding-up Act, of the Imperial Bank of England, praying that a sum of money standing to the credit of the cause of *Walworth v. Holt* might be paid over to him in the above-mentioned matter. The suit of *Walworth v. Holt* was instituted in or about 1840, for the purpose of settling the affairs of this bank; but, from the numerous parties and other circumstances, it was found impracticable to proceed with it successfully. During the proceedings, however, in the suit, the same was, as against some of the defendants, dismissed, with costs, but the plaintiff was unable to pay them. Since the passing of the Joint-stock Companies Winding-up Acts, an order for winding up the company had been obtained, under which the petitioner had been duly appointed official manager.

Bacon and *J. V. Prior*, for the petition.

Follett, *Hardy*, and *Fleming*, for parties in the suit, consented to the fund being paid over as prayed.

¹ 15 Jur. 853.

Ex parte Walker; in re The Royal Bank of Australia.

Hare, for the defendants against whom the bill had been dismissed, with costs, and who had not been served with the petition, asked that those costs might be ordered to be paid out of the fund before any part of it was handed over to the official manager. The costs had been taxed, but the plaintiff seemed totally unable to pay them. If the money were paid to the official manager, he would have no authority in the matter of the act to pay them; so that, if they were not ordered to be paid before the money was paid out of the accountant general's office, there would be no chance of the defendants receiving them at all.

Bacon argued, that, as the bill had been already dismissed against these particular defendants, the court had no jurisdiction to deal with the fund in the suit, since the order under the act of Parliament, giving a new jurisdiction, had been made; and as these defendants had no *locus standi* under the act, the court must leave them to their original remedy — namely, against the plaintiff personally.

KNIGHT BRUCE, V. C. It is no more than reasonable and just that the costs of these defendants, so taxed, and their costs of appearing here on this petition, should be paid out of the fund before it is handed to the official manager; and I so order accordingly.

Raymond

*Ex parte WALKER; in re THE ROYAL BANK OF AUSTRALIA.*¹

May 13, 1851.

Joint-stock Companies Winding-up Acts — Documents — Creditors — Inspection.

Creditors of a company ordered to be wound up filed their claims before the master, who, on their application, gave leave to inspect documents in the hands of the official manager:—

Held, on a motion by contributories to discharge the order, that the creditors were entitled to the inspection.

A MOTION in this matter was made on behalf of certain contributories of the company, that the order of Master Richards, dated the 8th of May, 1851, whereby it was ordered that Mr. Dobie should, on behalf of his respective clients, (whose claims to be admitted as creditors herein had been filed on the proceedings in his office by Mr. Dobie in this matter,) be at liberty to inspect and take copies, at their expense, of the several books and documents, in the said order mentioned, in the hands of the official manager in the above-named matter, might be discharged or varied. The creditors or debenture holders of the Royal Bank of Australia, having filed their claims in the

¹ 15 Jur. 853.

Ex parte Walker; in re The Royal Bank of Australia.

master's office, applied to the master for leave to inspect and take copies of certain documents relating to the bank which were in the hands of the official manager; and the master had, by the order now appealed from, given such leave.

Bacon, for the motion. These creditors must make out a case to establish their right to examine the books. The 48th section of the Winding-up Act of 1848, provides, "that, subject to the control of the master, all contributories shall be entitled, without fee or reward, to inspect all or any of the books of the company, or of the official manager or receiver, if any, and to take copies or abstracts of, or extracts from, all or any of such books, or any part thereof." These creditors are not contributories, and, therefore, have not the right under this section to inspect the books. The 58th section enacts, "that, except as is by the act expressly provided, nothing in the act contained, nor any petition or order under the same, for the dissolution and winding up, or for the winding up of any company, shall extend or enlarge, diminish, prejudice, or in any wise alter or affect the rights or remedies of creditors." A creditor must establish his right before he can compel the production of his debtor's books; and such right had not been established here. [He cited also the 63d section of the act of 1848, and the 19th section of the act of 1849.]

W. T. S. Daniel, for the official manager, did not object to the production of the books.

Wigram and *Selwyn*, for the creditors, were not called on.

KNIGHT BRUCE, V. C. Had this been an existing company, and a creditor had filed a bill to establish his claim, and the company, by their answer, had not sworn that the documents in their possession did not relate to the claim of the plaintiff, the plaintiff's right to inspection would have been plain and incontestable. I think a master has a discretion under the Winding-up Act to make such an order as the present, permitting the production and the inspection of the documents in the hands of the official manager; and as I see no reason to suppose that the master has not exercised his usual good sense and his proper discretion on this occasion, I shall refuse the motion, with costs.

In re Gedye.

*In re GEDYE.*¹

April 23, 1851.

*Solicitor — Taxation — Costs — Signed Bill — Responsibility —
Client — Agent.*

A solicitor, who sold his business, but who continued to conduct a suit in chancery in the office as the agent of one of the plaintiffs, independently of the solicitor who had purchased the business, will not be allowed to deny his agency, or to strike from the bills of costs of such solicitor the costs of proceedings which had been incurred by a mistake made in conducting the cause; and a petition for the taxation of the bills of costs under special circumstances was dismissed, with costs.

THIS was the petition of T. B. Simpson and Bryan Holme, praying for a reference to the master to tax and settle seven bills of costs.

In 1844, the petitioners, with Margaret Toulmin, deceased, were the plaintiffs in a suit of *Toulmin v. Copland*, which was brought before the court by original bill, and by bill of revivor and supplement, and they employed N. Gedye as their solicitor.

Some time previous to 1849, five bills of costs were left by Mr. Gedye with Samuel S. Toulmin, the son of Margaret Toulmin, and formerly the solicitor of the plaintiffs; none of these bills were signed, but they were accompanied by a cash account, in which Mr. Gedye gave credit for 50*l*.

On the 13th of August, in answer to an application from Mr. Gedye, asking for 150*l*. on account, Mr. Toulmin informed him that the bills apparently contained errors which would bring the amount of the bills to less than 200*l*. Mr. Gedye took no notice of this letter; but some weeks after, Mr. Lott, his clerk, called. Mr. Toulmin then gave him the bills, with the objections written upon them, and upon his returning them, he informed him that he objected to the costs occasioned by the filing the amended supplemental bill as an original bill, and also to the costs of the motion for taking it off the file.

Mr. Gedye declined to withdraw these costs, and Mr. Toulmin subsequently delivered the bills to his mother, but she died on the 4th of July, 1850, without any application being made to her by Mr. Gedye respecting the bills.

The petition also stated that Mr. Toulmin had no authority to receive the bills for the plaintiffs.

On the 23d of September, 1850, two other bills of costs were delivered to the executors of Mrs. Toulmin, accompanied by a letter from Mr. Gedye.

On the 21st of November, 1850, the petitioners obtained the common order for the taxation of the seven bills of costs; and on the 7th of November, 1850, a warrant was taken out and served upon Mr. Gedye.

On the 29th of January, 1851, upon the application of Mr. Gedye,

¹ 20 Law J. Rep. (N. S.) Chanc. 410. 15 Jur. 851.

In re Gedye.

the order of course for the taxation of the bills was discharged, without costs.

This petition now insisted that the sum of 36*l.* charged in respect of the supplemental bill taken off the file, and of the motion made for that purpose, was unreasonable. It also set out a portion of the bills, which included a sum of 15*l.* 6*s.* 8*d.* for a copy of the short-hand writer's notes, and alleged that the five bills contained many objectionable charges besides those specified, and that the correctness of the bills could not be ascertained without an examination of the papers, which Mr. Gedye refused.

The affidavits in opposition stated that Mr. Gedye purchased the business of Mr. Toulmin, who continued in the office and managed the cause of *Toulmin v. Copland*, and delivered to his clerk the engrossment of an amended supplemental bill, with directions to file it, without producing the order, which Mr. Toulmin himself had obtained, to amend, or informing him that it was an amended supplemental bill, which was consequently received and filed as an original bill. That Mr. Toulmin prepared the brief and affidavit to resist the motion to take this bill off the file, and referred counsel to the short-hand writer's note; that he acted generally as if he had the full sanction of his mother, as he gave directions without any communication with her; and that the bills of costs were delivered to Mr. Toulmin as the agent of his mother: but this was denied.

Mr. Freeling, in support of the petition. Mrs. Toulmin knew nothing of the delivery of the bills of costs until they were delivered to her by Mr. Toulmin, and at that time no action could have been brought upon the bills; their being unsigned, therefore, was a ground for asking for the taxation of the bills, though the client, under the 6 & 7 Vict. c. 73, could obtain an order for taxation of an unsigned bill. *In re Pender*, 8 Beav. 299; s. c. 2 Phill. 69; 16 Law J. Rep. (N. S.) Chanc. 25. *Billing v. Coppock*, 1 Exch. Rep. 14; s. c. 16 Law J. Rep. (N. S.) Exch. 265. The delay in applying for taxation had been caused by the correspondence respecting the charges, but no delay had taken place after the bills were delivered to Mrs. Toulmin. *In re Bagshawe*. 2 De Gex & Sm. 205. The bill also contained charges which originated with, and were consequent upon, mistakes made by the solicitor, and these charges included a sum of 15*l.* 6*s.* 8*d.* for the copy of the short-hand writer's notes: these could not be supported.

Mr. Roundell Palmer and *Mr. R. G. Welford*, contra. The bills were delivered to Mr. Toulmin some time in 1849; he acted as the agent of his mother. In the absence, therefore, of any special error, taxation will be refused on account of the delay. *In re Harper and Parry Jones*, 10 Beav. 284. The delivery of the bills of costs to an agent of the client had been held to be a sufficient compliance with the 6 & 7 Vict. c. 73. As to the question of negligence, Mr. Toulmin had his attention called to that so far back as 1849, but no objection was then made; the business, also, was actually transacted

In re Gedye.

by Mr. Toulmin himself, without the intervention of Mr. Gedye. The items also were consequent on Mr. Toulmin's neglect, and ought not to be charged to Mr. Gedye, especially the short-hand writer's note, which had been used by Mr. Toulmin when appealing against the order directing the bill to be taken off the file.

Mr. Freeling replied.

THE MASTER OF THE ROLLS. Five of the bills of costs, to which alone it will be necessary to refer, were delivered to Mr. Toulmin, who was not the plaintiff in the suit of *Toulmin v. Copland*, neither was he the client of Mr. Gedye. Unless, therefore, Mr. Toulmin was the agent for one of the plaintiffs to accept the delivery of the bills, an order for taxation would have been a matter of course.

On the 21st of November, 1850, an order of course was accordingly obtained, on the ground that the bills were not delivered to Mr. Toulmin as the agent of any one of the plaintiffs; but this was discharged on the 29th of January, 1851, as Mr. Toulmin was considered to be the agent of the substantial plaintiff in the cause, and the delivery to him was held to be equivalent to a delivery to her. I must consequently consider that the bills were duly delivered to the plaintiffs. The grounds for now asking for the taxation of these bills are: first, that the bills were unsigned, and that the clients are entitled to taxation, although they may not make out any such special circumstances as would be requisite if the bills had been signed; and secondly, that taking the bill as one to which the provisions of the 6 & 7 Vict. c. 73, apply, the petitioners have proved such special circumstances as entitle them to have the bills taxed.

In support of the first ground, it was urged that both reason, and the principles of equity, and all the decided cases settled that the solicitor who delivers an unsigned bill shall not take advantage of this defect; that he cannot deliver an unsigned bill and take the chance of its being paid, and, if the client should desire taxation, say, "This bill is a mere nullity; I will now deliver the real bill of costs;" and the case of *In re Pender* was cited. In that decision I fully concur; but it remains for consideration whether this view will entitle the petitioners to an order for the taxation of these five bills. The client who receives an unsigned bill of costs has a right to treat it either as a nullity, or as a bill delivered under the authority of the 6 & 7 Vict. c. 73: he may altogether disregard its existence, and treat it as waste paper, except upon a question for the delivery up of papers, as no action can be brought upon it. But the case of *In re Pender* has settled that the client may, if he pleases, treat the bill as duly signed by the solicitor under the 6 & 7 Vict. c. 73; he, in fact, by delivering an unsigned bill, gives the client an option of treating it as a nullity or as a bill duly signed; but that case does not sanction the idea that the client may treat the bill, first, in one way, and then in another, if the first does not suit his purpose; he cannot treat it first as a signed bill, and then, if it does not answer his purpose, treat it as a nullity. In this case, if it had been intended to treat these bills as a nullity,

In re Gedye.

the application ought to have been for an order of course for the delivery and taxation of the bills of costs; but instead of that, they have treated the bills as properly delivered under the 6 & 7 Vict. c. 73, and applied for an order of course to tax them, and as that was discharged, they now apply for an order to tax them under special circumstances. Such a course is inconsistent with treating the bills as duly signed, and here I think that the clients have waived the formality, and treated the bill as duly signed. It was argued, though the bill had not been treated as a mere nullity, that the want of the signature might be treated as a special circumstance, upon which the court would direct the taxation; but I cannot concur in that argument. The statute provides, where the bill is signed, that certain special circumstances shall be proved to induce the court to admit the taxation of that bill; and the want of signature cannot be treated as one of those special circumstances, for the very purpose is that the bill is to be treated as a signed bill properly delivered. I cannot, therefore, regard that argument, but must treat the bill as if it were properly signed and delivered, and consider whether, in the special circumstances alleged, there are any reasons whatever to induce the court to direct a taxation.

First, then, as regards the lapse of time, I find no satisfactory explanation. The exact time of the delivery of the bills is not ascertained, but it was before August, 1849; no step was taken for upwards of a year; reference was made to the correspondence, but it does not afford any satisfactory explanation of the delay; it contains nothing more than complaints of certain items in the bills of costs, which are defended by Mr. Gedye. Since November, 1850, the pending proceedings have been relied upon to excuse the lapse of time, but I cannot consider the previous time sufficiently accounted for.

I have, then, to consider the special circumstances arising from the alleged overcharges, and my attention has been called to two especially, assuming I presume, that if those do not entitle the petitioners to the order asked, the others would not: to those items, therefore, I have only directed my attention. One is, that, in consequence of filing an amended supplemental bill as if it had been an original bill, a motion was made to take it off the file, and costs amounting to 36*l.* were incurred; this, it has been argued, was negligence on the part of the solicitor, for which he is not entitled to charge against the clients. But from the facts detailed in the affidavits, which are without contradiction, it appears that Mr. Toulmin delivered the engrossed bill to the clerk of Mr. Gedye to file, without mentioning that it was an amended bill; he assumed, and believed no doubt, that the clerk, from his being constantly at the office, would know what had been going on, and would be aware that the bill was an amended bill; he, however, was not aware of that fact, and he filed the bill as an original bill, and, in consequence of this, the costs of the motion for taking it off the file were incurred. It was argued that if a solicitor, at the request of a client, takes an improper step which creates costs, the solicitor cannot exonerate himself from the costs incurred by his conduct, because, as the client would naturally be supposed to be

In re Gedye.

ignorant of legal proceedings, it would be the duty of the solicitor to call his client's attention to the circumstances. Without, therefore, disputing that proposition, it remains to be considered how far it applies to this case.

Until 1844, Mr. Toulmin was the solicitor of Mrs. Toulmin in the cause of *Toulmin v. Copland*; he then sold his business to Mr. Gedye, and it was a part of the conditions of sale that Mr. Toulmin should transact the business in chancery, and in particular that arising out of this suit; he did, therefore, manage this business, and Lord Langdale, when he discharged the common order to tax these bills, did not decide when Mr. Toulmin became the agent of his mother; he had been her solicitor to the time of settling his business, and the affidavits do not enable me to fix any period at which the agency ceased, and I feel compelled to treat him as the agent of his mother throughout the whole of the transaction. I therefore consider the case as if Mr. Toulmin had been the client himself. Concurring, therefore, in the view taken of the duty of a solicitor towards his client, I consider that if the client himself, being a solicitor, assists in conducting his own business under such terms as existed between Mr. Gedye and Mr. Toulmin, and makes a mistake in the practice, he cannot throw the consequences upon the actual solicitor in the cause.

Assuming, therefore, that a mistake was made, I do not think that Mr. Gedye, who really knew nothing of the business, but trusted the whole to Mr. Toulmin, can be considered as the person liable for the consequences. There possibly was blame on both sides; I am far from saying that Mr. Toulmin or the clerk were solely the cause of the mistake, but I think that Mr. Gedye cannot be made answerable.

The only other item is the copy of the short-hand writer's notes. The affidavits state that it was made at the suggestion of Mr. Toulmin, and that he referred to them as important in the observations made to counsel in the case; that remains uncontradicted. But, independently of the propriety of this item, I think it is not one which I can consider an overcharge, or one on account of which I ought to allow this bill to be taxed. It is not necessary for me to consider whether, if these items had been considered overcharges, they would have been sufficient for directing the bills to be taxed, as, under the circumstances, I think they are not such as will entitle the petitioners to the order asked. I think the time being unaccounted for will not allow me to direct the taxation. I do not concur in the argument that the bills being unsigned, and the way in which they were treated by the petitioners, can ever entitle them to obtain an order for taxation. The result, therefore, is, that the petitioners are not entitled to the order they ask; and the petition must be dismissed, with costs.

In the Matter of Simpson's Settlement.

In the Matter of SIMPSON'S SETTLEMENT.¹

June 14, 1851.

Power — Default of Appointment — Joint and separate Powers of Appointment.

By the settlement made on the marriage of A. and B., certain real estates were conveyed to trustees upon trust to pay the rents to A. for life, and, after his death, to B. for life, and, after the death of A. and B., upon trust for such one or more of the children of the marriage as A. and B. should by deed jointly appoint; and, in case of the death of A. in the lifetime of B., before any such appointment should be made, as B. by deed should appoint. A. and B. jointly appointed two fourths of the estate to two of their children. A. died. B. appointed the other two fourths to two other of the children:—

Held, that the appointments made by B. alone were valid.

By indentures of settlement, dated the 14th and 15th of June, 1797, and made on the marriage of Mr. Simpson and Miss Duberly, certain real estates belonging to Miss Duberly were conveyed to trustees in fee, upon trust to pay the income to Mr. Simpson for life, and, after his death, to Mrs. Simpson for her life. The trusts of this property, after the death of the survivor, were then declared in the following terms: "To the use of any one child, or any two or more children, of the said H. H. Simpson on the body of the said M. A. Duberly to be begotten, in such parts, shares, and proportions, in case there should be two or more such children, and for such estate and estates, and in such manner, and with, under, and subject to such powers, provisoes, conditions, and restrictions, and with such limitations over (but such limitations over to be for the benefit of some or one of the said children) as the said H. H. Simpson and M. A. Duberly, at the time or times during their joint lives, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by them and each of them sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, should direct, limit, and appoint; and in case of the death of the said M. A. Duberly in the lifetime of the said H. H. Simpson, before any such direction, limitation, or appointment should be made, then as the said H. H. Simpson, at any time or times during his life, after the decease of the said M. A. Duberly, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto to be by him signed, sealed, and published in the presence of, and to be attested by, three or more credible witnesses, should direct, limit, or appoint; but, *in case of the death of the said H. H. Simpson in the lifetime of the said M. A. Duberly, before any such direction, limitation, or appointment should be made*, then as the said M. A. Duberly, at any time or times during her life, and whilst she should be sole and unmarried, after the death of the said H. H. Simpson, by any deeds or

¹ 20 Law J. Rep. (N. S.) Chanc. 415.

In the Matter of Simpson's Settlement.

deed, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament in writing, or any codicil thereto to be by her sealed and published in the presence of, and to be attested by, three or more credible witnesses, should direct, limit, or appoint; and in default of all such direction, limitation, or appointment as aforesaid," upon the trusts therein mentioned.

There were four children of the marriage. Mr. and Mrs. Simpson, by a deed, dated in March, 1821, jointly appointed one fourth of the trust property to one of their children, and by another deed, dated in October, 1833, jointly appointed another fourth to another of their children. Mr. Simpson died in 1835. Mrs. Simpson, by two deeds, dated in February, 1836, appointed the other two fourths of the trust property to her two other children. Mrs. Simpson died in 1850.

The real estate, which was the subject of the settlement, had been sold under a power contained in the settlement, and the purchase money had been invested in consols, in pursuance of the settlement. The trustees of the settlement transferred two fourths of the stock to the two children in whose favor the joint appointment had been made, and those claiming under them, and paid the residue into court under the Trustee Relief Act.

This was a petition presented by the two children in whose favor the appointments had been made by Mrs. Simpson and those claiming under them, praying for a transfer of the stock which had been transferred into court. The only question on the petition was, whether Mrs. Simpson's appointments were valid. By the settlement, a power was given to Mr. and Mrs. Simpson to appoint the estates jointly. It was then declared that, if Mr. Simpson should die in the lifetime of Mrs. Simpson, before any such appointment should be made, Mrs. Simpson should have a power of appointment. As a joint appointment of a part of the property had been made by Mr. and Mrs. Simpson, it was considered doubtful whether Mrs. Simpson had ever any sole power of appointment.

Mr. James Parker and Mr. Walford, for the petition.

Mr. Kenyon Parker and Mr. Briggs, Mr. Malins and Mr. Austen, Mr. Bacon and Mr. Boyle, for the parties claiming adversely to the petitioners, cited *Simpson v. Paul*, 2 Eden, 34.

Mr. Russell and Mr. B. L. Chapman, for the trustees.

Knight Bruce, V. C., said that the expression, "any such appointment," must be taken to mean a complete appointment of the whole estate, and that, whatever the words were, the meaning to be collected from the whole of the instrument was, that whatever was not appointed by Mr. and Mrs. Simpson jointly should, in the event which happened, — the death of Mr. Simpson in the lifetime of Mrs. Simpson, — be subject to her sole appointment. Her appointments, therefore, were valid, and the fund belonged to the petitioners.

In re Lowndes's Trust.

*In re LOWNDES'S TRUST.*¹

April 26, 1851.

Payment of Dividends — Estate for Life — Prospective Order — Evidence.

The dividends of a sum of stock were ordered, upon petition, to be paid to A. for her life, and, after her decease, to B. for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused.

The dividends of a small sum of stock, arising from the purchase money of real estate taken by a railway company, were ordered to be paid to a party claiming under a will, upon production of the probate copy, with an affidavit that it had been examined and was correct.

THE North Staffordshire Railway Company had taken some freehold hereditaments, in respect of which they paid 417*l.* into court. The hereditaments were subject, together with other hereditaments, to the payment of an annuity of 500*l.* to Mrs. Sewell for her life; and, subject to that charge, were vested in trustees for the benefit of Mrs. Reddall for her life, with remainder to her eldest son in fee, and, in default of such issue, to Susannah K. Reddall in fee.

A petition was now presented, by Mrs. Sewell, Mrs. Reddall, and, Susannah K. Reddall, praying the investment of the money, and the payment of the dividends to Mrs. Sewell for her life, and, after her decease, to Mrs. Reddall for her life; and that, after her decease, the principal might be paid to Susannah K. Reddall. Mrs. Reddall had been married many years, and had had no male issue.

Mr. Twells appeared in support of the petition, and cited a case of *How's Trust*.²

Knight Bruce, V. C., made the order as prayed respecting the payment of the dividends; but declined to make any order respecting the payment of the principal.

The interest of Mrs. Reddall and Susannah K. Reddall was derived under the will of Mr. Lowndes. The order on the petition was directed to be drawn up upon production to the registrar of the probate copy of the will, and an affidavit of the solicitor that he had examined it with the original, and that it was a correct copy; and the production of the will itself was dispensed with.

¹ 20 Law J. Rep. (N. S.) Chanc. 422.

² The matter of *How's Trust* came before Vice Chancellor Knight Bruce in July, 1850. By a marriage settlement, a sum of stock had been settled for the benefit of the wife for her life, and, after her decease, for the husband for his life. The fund had been brought into court under the 10 & 11 Vict. c. 96. Upon the petition of the husband and wife, which was supported by Mr. Taylor, and to which Mr. Cory, on behalf of the trustees, consented, the vice chancellor made an order for the payment of the dividends to the wife for her life, and, after her decease, to the husband for his life.

In re Hough's Estate.

*In re HOUGH'S ESTATE.*¹

April 26, 1851.

Will — Construction — Revocation.

A testator, by his will, devised his real estate to A. and B. in fee, on certain trusts, and by a codicil appointed C. "to be a trustee and exocutor of his will in the place of A., whom he did not wish to act as executor:" —

Held, that the codicil acted as a revocation of the devise made to A. by the will.

A TESTATOR, by his will, dated the 8th of February, 1837, devised his real estates to John Loman and John Howard in fee, upon certain trusts. The testator made a codicil to his will, dated the 9th of February, 1837, which was as follows: "I do hereby nominate and appoint Fisher Redhead, of, &c., clergyman, to be a trustee and executor of my will, in the place of John Howard, whom I do not wish to act as executor."

Mr. Loman and Mr. Redhead disclaimed the trusts of the will.

This was a petition, under the Trustee Act of 1850, by thirty of the persons claiming to be interested under the will of the testator, praying for a reference to the master to approve of new trustees in the place of the disclaiming trustees.

Mr. Freeling, for the petition.

Mr. Swinburne, for one of the persons entitled under the will, opposed the petition: first, on the ground that the legal estate in the property devised to Mr. Howard by the will had not been taken out of him by the codicil; and, secondly, because a claim had been already filed in respect of the testator's estate, and that, until it was heard, the question of the appointment of new trustees ought to stand over.

KNIGHT BRUCE, V. C., said that there was quite enough in the codicil to take out of Mr. Howard the estates devised to him by the will. As to the other point, as the greater part of the *cestuis que trust* wished for a reference, he would make it.

¹ 20 Law J. Rep. (N. S.) Chanc. 422.

Day v. Croft.

DAY v. CROFT.¹

June 12 and 16, 1851.

Receiver — Parties numerous — Decree — Subsequent Proceedings — Attendances.

Where the expenses of attending the passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only.

In the absence of directions made at the hearing of a cause, the court will not, upon an interlocutory application, make any order to restrain the defendants, though very numerous, from attending the subsequent proceedings in the cause, though the result would be a very large saving to the estate of the testator.

THE annuitants and residuary legatees interested in the testator's real and personal estate, parties to this suit, were very numerous, and as the decree made in the cause contained no direction to the contrary, they insisted upon their right to be served with, and to appear upon, all the subsequent proceedings in the suit, though the estate was thereby put to very great expense.

Mrs. Claggett, by her petition, among other things, now asked that all future applications to the court, whether made by herself or any other person or persons having the conduct of the cause, might in the first instance, and unless otherwise directed by the court, be made without serving any of the defendants, except the executors and trustees of the testator's will and codicil or the survivor of them.

The petition also asked that the receiver might pass all future accounts of his receipts and payments once a year, instead of half yearly, unless the master should otherwise think fit.

The petition stated that great unnecessary costs had been occasioned to the testator's estate in these suits, in consequence of the defendants appearing by separate solicitors, and that it would be for the benefit of the estate and of all parties interested if the future proceedings were conducted as asked.

That the receiver's salary amounted to 936*l.* a year, and that 600*l.* a year would be saved in attendances before the master.

Mr. Toller said, that where a class of persons interested is numerous, the court will consider it a matter of convenience whether it would require them all to be made parties to a suit, or allow them to attend the subsequent proceedings, and one of a class had been allowed to represent others. *Harvey v. Harvey*, 4 Beav. 215. *Caldecott v. Caldecott*, Cr. & Ph. 183; s. c. 10 Law J. Rep. (N. S.) Chanc. 178.

Mr. Roupell, Mr. Lewin, and several other counsel represented the defendants, and insisted upon their right to attend the proceedings in the cause.

¹ 20 Law J. Rep. (N. S.) Chanc. 423.

Peters v. Beer.

THE MASTER OF THE ROLLS. I think I may direct that the receiver's accounts shall be passed once a year only.

The residuary legatees are entitled to attend the subsequent proceedings; if it was objected to, directions should have been obtained at the hearing of the cause.

The legatees must be considered the best judges of what is most beneficial for their own protection. I must, therefore, dismiss this part of the petition, with costs.

PETERS v. BEER¹

June 12 and 17, 1851.

Examination of Witnesses — Commissioners — Fees — Depositions — Lien.

In the absence of a special agreement, a commissioner for the examination of witnesses will not be required to file the depositions taken in the cause without payment of his fees.

THIS was a motion that John Frampton, the commissioner in the suit acting for taking the examination of witnesses, might forthwith file with the clerk of records and writs the depositions of the witnesses taken under the commission issued.

Mr. E. Harrison, in support of the motion. The solicitor of the plaintiff understood that the commissioner would not call for his fees until the suit was concluded, as he was well aware that the plaintiff had no property except that in the suit. The duty of the commissioner was pointed out by the 109th order of May, 1845, Ord. Can. 328; 14 Law J. Rep. (N. S.) Chanc. 295; he had no right to detain the depositions.

Mr. S. Smith, for Mr. Frampton, insisted that no special agreement to wait for the fees had been made out. There was no dispute respecting the amount, which was about 80*l*. The commissioner had no remedy for the recovery of his fees, and the practice was to pay him immediately; and even if the amount was disputed, the court would restrain him from bringing any action for his fees, and refer it to the master to ascertain what was due. *Ambrose v. The Dunmow Union*, 8 Beav. 43. *Blundell v. Gladstone*, 9 Sim. 455; a. c. 8 Law J. Rep. (N. S.) Chanc. 109.

Mr. Harrison, in reply.

THE MASTER OF THE ROLLS. I do not consider that any special

¹ 20 Law J. Rep. (N. S.) Chanc. 424.

Coyle v. Alleyne.

agreement has been made out; but before I decide the claim of the commissioner, I will inquire into the practice.

June 17. The MASTER OF THE ROLLS. I have made inquiry of the several registrars, and I find that the commissioner has a lien upon the depositions for his fees. I must, therefore, refuse the application, with costs.

COYLE v. ALLEYNE.¹

July 24, 1851.

Practice — Exceptions — Injunction, Bill for — Setting down Exceptions.

Where exceptions for scandal and impertinence had been taken by the defendant to a bill filed for an injunction, but he neglected to set them down for hearing, the plaintiff was allowed to set them down.

Orders of court do not take away its general jurisdiction.

THIS was an application, by the plaintiff, asking permission to set down exceptions which the defendant had taken to his bill for scandal and impertinence, but which he refused to set down. The plaintiff desired to get the common injunction; he had consequently applied to set the exceptions down, but the clerk of records and writs declined to receive them, under the impression that the defendant alone could set them down, as the 12th order of the 2d of November, 1850, 20 Law J. Rep. (N. S.) Chanc. 2, stated "that exceptions were to be set down for hearing by the party filing the same."

Mr. G. L. Russell, on behalf of the plaintiff, now applied for leave to set down the exceptions. *Hughes v. Thomas*, 2 Coll. 239; s. c. 7 Beav. 584.

The MASTER OF THE ROLLS. The plaintiff is entitled to the order asked. The general order of the 2d of November, 1850, does not take away the general jurisdiction of the court.

¹ 20 Law J. Rep. (N. S.) Chanc. 428.

In re Russell's Estate. — Lock v. De Burgh.

In re RUSSELL'S ESTATE.¹

April 26, 1851.

Infants — Guardian — Petition — Next Friend.

A petition by infants for the appointment of a guardian ought to be presented by them by their next friend.

THIS was a petition by infants, for the appointment of a guardian.

Mr. Jolliffe, for the petition.

KNIGHT BRUCE, V. C., asked if the petition was presented by the infants by their next friend.

It appearing that the petition was presented by the infants alone, —

KNIGHT BRUCE, V. C., directed that a next friend of the infants should be named in the petition.

LOCK v. DE BURGH.¹

June 4, 1851.

Rents — Apportionment.

By indentures, dated in 1828, certain lands were settled on A. for life, and a power of leasing was given to A. The Apportionment of Rents Act was passed in 1834. After 1834, A., under his power, granted leases of divers portions of the settled property. A died in 1849: —

Held, that A.'s personal estate was entitled to a proportion of the rents of the lands of which he had granted leases under his power, between the last days of payment of rent and his death.

By indentures of settlement, dated the 16th and 17th of January, 1828, certain lands were conveyed to the use of Mr. Lock for life, with divers remainders over. Mr. Lock had, under the settlement, a power of leasing, under which he granted leases of divers portions of the settled property.

Mr. Lock died on the 9th of December, 1847. .

By the 2d section of the Apportionment Act, (4 Will. 4, c. 22,) which was passed in 1834, it is enacted, "that from and after the passing of this act all rents service reserved on any lease by a tenant in fee or for life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this act,) and all rents charge and other rents, &c., and all other payments of every description, in the United Kingdom of Great Britain and

¹ 20 Law J. Rep. (n. s.) Chanc. 384.

Pawsey v. Barnes.

Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, shall be apportioned so, and in such manner, that on the death of any person interested in any such rents, his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, (as the case may be,) including the day of the death of such person."

A question arose in this suit whether the personal estate of Mr. Lock was entitled to a proportion of the rents of the property which had been leased by him, under the power, between the last days of payment of the rents and his death.

Mr. Calvert and Mr. Brett, for the plaintiff.

Mr. Willcock and Mr. Keene, for the other parties.

The case of *Knight v. Boughton*, 12 Beav. 312; s. c. 19 Law J. Rep. (N. S.) Chanc. 66, was cited.

KNIGHT BRUCE, V. C., said, that as the leases were instruments executed after the act had been passed, he thought that the estate of Mr. Lock was entitled to a proportion of the rents reserved by those leases, up to the time of his death.

PAWSEY v. BARNES.¹

May 5, 1851.

Claim — Statute of Limitations — Produce of Real Estate directed to be sold — Stale Demands.

A testator, by his will, devised his real estate to A. and B., on the usual trusts, for sale, and directed them to pay a share of the purchase moneys to A. The testator died in February, 1816, and A. and B. proved the will. A. died in October, 1817. B. died in 1849, having appointed C. his executor. Letters of administration of A.'s estate were granted to D. in June, 1850. A claim filed by D., the administrator of A., against C., the executor of B., in respect of the share of the purchase moneys of the testator's estate given to A. was dismissed, with costs, but without prejudice to a suit.

Whether the produce of real estate directed to be sold is a "sum charged upon or payable out of land" within the meaning of the 40th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27 — *quere*.

JOHN DENNANT, by his will, dated the 13th of January, 1816, devised all his real estate to John Pollard and James Hearn, and their heirs, upon the usual trusts for sale; and directed them to pay the sums therein mentioned out of the purchase moneys, and to divide the residue between John Pollard and certain other persons therein

¹ 20 Law J. Rep. (N. S.) Chanc. 393.

Pawsey v. Barnes.

named. The testator appointed John Pollard and James Hearn to be his executors.

The testator died in February, 1816, and his will was proved by both his executors in August, 1816.

John Pollard died in October, 1817.

James Hearn died in 1849, having, by his will, appointed the defendant, Mr. Barnes, his sole executor and trustee.

On the 17th of June, 1850, letters of administration of the estate of John Pollard were granted to Mary Ann Pawsey, the wife of William Pawsey.

A claim was filed by Mr. and Mrs. Pawsey, against Mr. Barnes, as executor of Mr. Hearn, in respect of the share of the purchase moneys of the real estate given by the will of Mr. Dennant to John Pollard.

It was stated, in an affidavit filed by the plaintiffs in support of the claim, that they believed that the whole or the greater part of the real estates of the testator, Mr. Dennant, had been sold in 1835.

Mr. Wigram and *Mr. Elderton*, for the claim, stated the 25th section of the 3 & 4 Will. 4, c. 27, which enacts, "That when any land shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to *recover such land*, shall be deemed to have first accrued at, and not before, the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him," and cited *Ward v. Arch*, 12 Sim. 472.

Mr. Malins, for the defendants. By the 40th section of the 3 & 4 Will. 4, c. 27, it is enacted, "That after the 31st of December, 1833, no action or suit or other proceeding shall be brought, to recover *any sum of money* secured by any mortgage, judgment, or lien, or otherwise *charged upon or payable out of any land*, or rent at law, or in equity, or *any legacy*, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same."

[*Knight Bruce*, V. C. Is the produce of real estate directed to be sold a sum charged on, or payable out of, land?]

Mr. Malins. It must be considered as coming within the 40th section. It has been settled that a bequest of the residue of personal estate is a *legacy* within the meaning of this section. *Prior v. Horniblow*, 2 You. & C. 201. *Christian v. Devereux*, 12 Sim. 264. *Adams v. Barry*, 2 Coll. 290. By the 6th section of this act it is enacted, "That, for the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." The right, therefore, of the plaintiff to sue must be dated from October, 1817, the time of

Rackham v. Cooper.

the death of Mr. Pollard. Taking, then, the right to a share of the produce of real estate to come within the 40th section, the plaintiffs are clearly barred. They are also barred by lapse of time, independently of the statute. The right of a court of equity to refuse a stale demand has been expressly excepted by the 27th section of this act, which enacts, "That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this act."

Mr. Glasse, on the same side.

KNIGHT BRUCE, V. C. The testator died in the early part of the year 1816, and his will was proved in August, 1816, by the two executors. John Pollard lived rather more than a year afterwards, and died in 1817. Now, considering that there is no trace of any claim during the life of Mr. Hearn, who did not die until 1849, and the letters of administration on which the claim is founded were not obtained until after the death of Mr. Hearn, from whom probably more information on the subject could have been obtained than from any other person, I think that, independently of the statute, and without reference to it, there is a great doubt whether the plaintiffs are not barred by lapse of time. There have been several instances in which I have not felt myself prevented by the difficulty of the matters brought before me from adjudicating on a claim. In this case, however, I decline to decide the point. I shall dismiss the claim with costs, without prejudice to a suit. It is competent for you, Mr. Wigram, to bring this question before the court in a suit.

RACKHAM v. COOPER.¹

May 29, 1851.

Claims — Practice — Affidavit of Service — Non-appearance of Plaintiff.

Where a claim is called on and the plaintiff does not appear, the defendant will not be entitled to a decree for the dismissal of the claim with costs, unless he produces, before the rising of the court, an affidavit of service of the writ of summons.

THIS was a claim which now came on to be heard. The plaintiff did not appear.

The 13th order of the 22d of April, 1850, [19 Law J. Rep. (N. S.) Chanc. 3,] is as follows: "At the time appointed for showing cause, upon the motion of the plaintiff, and on hearing the claim, and what may be alleged on the part of the defendant, or upon reading a

¹ 20 Law J. Rep. (N. S.) Chanc. 394.

Shardlow v. Gaze.

certificate of the appearance being entered by the defendant, or an affidavit of the writ of summons being duly served, the court may," &c.

Nothing appears in these orders as to the course to be adopted at the time appointed for showing cause if the plaintiff should not appear.

Mr. Walford, for the defendant, asked that the claim might be dismissed with costs.

KNIGHT BRUCE, V. C., asked if the defendant's counsel was provided with an affidavit of service of the writ of summons.

Mr. Walford, for the defendant, said, that he had not such affidavit, and that he feared that it could not be provided before the rising of the court.

KNIGHT BRUCE, V. C., said, that if such affidavit was dispensed with by other branches of the court, he would follow the practice; but if he had to act on his own opinion, and in the absence of authority, he should require it.

Mr. Osborne (amicus curiæ) said that Sir George Turner had required such an affidavit.

In the course of the day, *Mr. Walford* stated that he was provided with an affidavit of service, and the claim was ordered to be dismissed with costs.

SHARDLOW v. GAZE.¹

May 10, 1851.

Claims — Evidence — Plaintiff's Affidavit.

A plaintiff's affidavit in support of a claim will be treated as evidence where there is no opposition or conflict of affidavits.

THIS was a common claim. The plaintiff had filed an affidavit in support of it. The facts stated in it were not disputed by the defendant. There was no other evidence.

Mr. Elmsley, for the plaintiff.

Mr. Amyot, for the defendant.

KNIGHT BRUCE, V. C., said, that the plaintiff's affidavit was not evidence where there was a conflict of affidavits. Where, however, there was no opposition, he should treat it as evidence.

¹ 20 Law J. Rep. (n. s.) Chanc. 395.

Matthews v. Pincomb.

MATTHEWS v. PINCOMB.¹

June 28, 1851.

Common Claims — Special Claim — Legacy and Interest.

Where a question, which ought to have been made the subject of a special claim, is brought before the court on a common claim, the court will give leave to have it filed as a special claim *nunc pro tunc*.

A testator bequeathed a legacy, payable to the legatee at the age of twenty-one, with interest from his death, and died in 1840. The legatee attained the age of twenty-one in 1850, and filed a common claim for the legacy, with interest, from her majority, and obtained a decree for the payment of the amount claimed, and received the money. The legatee afterwards, having discovered that she was entitled to interest from the testator's death, filed another common claim for this interest:—

Held, that she was entitled to this interest, but that she ought to have made it the subject of a special claim.

WILLIAM PINCOMB, by his will, dated in November, 1838, gave a legacy of 100*l.* to the plaintiff, Miss Matthews, to be paid to her at the age of twenty-one years, with interest from his death, and appointed the defendant his executor, and died in May, 1840.

Miss Matthews attained the age of twenty-one years in March, 1850, and soon after filed a claim against the defendant for the legacy, with interest from the time of her attaining her majority. The claim came on to be heard in December, 1850, and the defendant then consented to a decree for the payment of the legacy and interest from the majority, and the money was soon after paid.

After the payment of the money, the plaintiff discovered that, according to the terms of the will, she was entitled to interest on the legacy from the death of the testator, and applied to the defendant for payment of it, to which application he declined to accede.

The plaintiff thereupon filed a common claim against the defendant for this interest.

The defendant then moved that this claim should be taken off the file for irregularity.

Upon the motion being made, the court ordered that it should stand over, to come on with the claim.

The claim and the motion now came on to be heard.

Mr. A. Smith, for the plaintiff, contended that the question as to interest had been properly made the subject of a common claim, either as an original claim, or as a supplemental one, under the 25th order of the 22d of April, 1850, [19 Law J. Rep. (N. S.) Chanc. 4,] by which it is declared, that "where any further or supplemental relief is sought, and such supplemental relief is such as is provided for in any of the cases enumerated under order 1, a supplemental claim may be filed in such of the forms set forth in schedule A as is applicable to the case." He also referred to *Dormer v. Fortescue*, 3 Atk. 124; *Forrest v. Scholfield*, 14 Jurist, 845; and *Scargill v. Hurry*, Ibid. 847.

¹ 20 Law J. Rep. (N. S.) Chanc. 395.

Carmichael v. Hughes.

Mr. Southgate, for the defendant, contended that the plaintiff had been precluded, by her former suit, from taking any proceeding, in any way, as to the interest on the legacy; and, secondly, that if she was entitled to any relief, a common claim was not the proper way of seeking it.

Knight Bruce, V. C., said, he thought that the plaintiff was entitled to the relief asked for. As to the form, however, in which the relief was sought, he thought that it ought to have been made the subject of a special claim. He would, however, give leave that it should be filed as a special claim *nunc pro tunc*. The plaintiff must pay the defendant the costs of the motion for taking the claim off the file.

CARMICHAEL v. HUGHES.¹

February 10, 1851.

Infant — Past Maintenance.

A petition was presented by an infant who had for some years been entitled to property amounting to 290*l.* per annum. The petitioner had been maintained by his father, who had incurred a large debt for the purpose, and was unable any longer to maintain his son. The petition stated that the father had been resident for many years in India, and it asked for a sum of 300*l.* for past maintenance:—

Held, that the father having resided out of the country, and being unable to apply to the court before, was a special circumstance which would enable the court to grant the sum required for past maintenance.

A PETITION was presented by Ludovick Montefiore Carmichael, an infant, the plaintiff in the cause, suing by his next friend, Alexander Henry, and it stated that a reference had been made to the master to inquire whether the petitioner's father was of ability to maintain him, and if he should find that he was not of such ability, then to approve of a proper person to act in the nature of guardian to the petitioner during his minority, and to inquire and state to the court the age of the petitioner, and the amount of his property, and to state who had maintained the petitioner, and whether any and what sum should be allowed for his past maintenance, and what was proper to be allowed for future maintenance; that the master had made his report, which stated that Ludovick Carmichael, the father of the infant, in consequence of severe pecuniary losses sustained in business, had been rendered incapable of maintaining and educating the petitioner, and in order to defray the expense of such maintenance and education during the last nine years, the said father had been obliged to borrow money and incur obligations for that purpose, and that he was not of ability any longer to maintain and educate the petitioner, and

¹ 20 Law J. Rep. (n. s.) Chanc. 396.

Carmichael v. Hughes.

being of that opinion, he had entertained and approved of a proposal for the appointment of Alexander Henry as his guardian.

The master then set forth the property of the petitioner, which amounted to an annual income of about 290*l.*, besides a sum of 1897*l.* stock, and 55*l.* cash, to which he was absolutely entitled; that the petitioner had been wholly maintained by his father, but since his pecuniary losses he was unable any longer to educate the petitioner in a manner suitable to his fortune and expectations, without involving himself further in debt; that it had been proposed that the sum of 600*l.* should be allowed for the past maintenance of the petitioner during the period of nine years, but he (the master) was of opinion that the sum of 300*l.* only should be allowed for that purpose. And that a sum of 200*l.* per annum should be also allowed for future maintenance; that the petitioner's father was a merchant at Calcutta, and had resided there for many years; that the petitioner was under fifteen years of age; that he was born on the passage of his mother to England, in 1836, and he had ever since resided in England.

The petition prayed that the said sum of 300*l.* might be paid to the father for past maintenance; that the said Alexander Henry might be appointed the guardian of the infant; and that the sum of 200*l.* per annum should be paid to such guardian for the future maintenance of the petitioner.

Mr. Osborne appeared in support of the petition, and urged the court to allow the 300*l.* to the father for past maintenance, on the ground that he had fallen into pecuniary difficulties, and had been obliged to borrow money at exorbitant interest to maintain his son.

[*Lord Cranworth*, V. C., said, the father could not have been obliged to borrow the money, because he might have come to the court for future maintenance long ago, and then the court might have put some terms upon the manner of maintenance. His lordship did not see how he could allow past maintenance under the circumstances stated.]

Mr. Osborne submitted that the father had at first been able to maintain the petitioner, and was, therefore, anxious to leave his son's income untouched. The reason he had not come to the court before was his continued residence in India. He had made an affidavit confirming the facts stated in the petition with regard to his inability to maintain the petitioner, and to his having incurred liabilities to the amount of 1000*l.* in paying for his past maintenance. The following cases were cited in support of the petition: *Stopford v. Lord Canterbury*, 11 Sim. 82. *Bruin v. Knott*, 1 Phill. 572; s. c. 14 Law J. Rep. (N. S.) Chanc. 440. *Sherwood v. Smith*, 6 Ves. 454. *Reeves v. Brymer*, 6 Ves. 425; and *Ford v. Fowler*, a case heard before the master of the rolls, in which his lordship made an order granting 576*l.* to a father for the past maintenance of his son, the circumstances showing that the father was not of ability to maintain his son.

Trye v. The Corporation of Gloucester.

Mr. Beales appeared for the father of the petitioner and supported the prayer.

LORD CRANWORTH, V. C. The case of *Reeves v. Brymer* does not appear to me to represent the practice of the court within the last fifty years. A father cannot have past maintenance for his son, except there are special circumstances. The special circumstances here are that the father is resident in India, and has not had facilities for applying to the court. I think I may make an order for the past maintenance in this case, on the ground of the father's inability to apply, owing to his non-residence in this country.

Ordered as prayed.

TRYE v. THE CORPORATION OF GLOUCESTER.¹

June 5 and 24, 1851.

Mortmain.

A testator gave a sum of consols to the corporation of G., upon trust, in the first place, to raise 1300*l.*, which sum he directed should, in the event of any land being given or granted to the corporation for the purpose of his charity within the period of ten years next after his decease, under the provisions of stat. 9 Geo. 2, c. 36, be laid out and expended in or towards the foundation and building and furnishing, of a substantial hospital for the city of G.; and he directed that no part of the said trust moneys should be applied in purchasing land; and that in case no land or site should be granted or conveyed for the purposes aforesaid within ten years after his decease, then the trust moneys should sink into the residue of his estate. A grant of land was made shortly before the expiration of ten years from the testator's decease, as a site for the intended hospital, but the deed was not enrolled till five days after the expiration of the ten years:—

Held, that the grant was a sufficient compliance with the conditions prescribed by the testator; but that the bequest was void, as offering an inducement for putting land in mortmain.

A bequest is void which tends directly to bring fresh land into mortmain; and a bequest of money to be expended in the erection or repair of buildings is also void, unless the testator in his will expressly states his intention that the money so bequeathed is to be expended upon some land already in mortmain.

JOHN HARVEY OLLNEY, of Cheltenham, deceased, by his will, dated the 3d of January, 1836, gave and bequeathed unto Henry Norwood Trye, Thomas Henney, and William Charles King, their executors and administrators, the sum of 36,000*l.* secured to him by a contract with the said William Charles King, bearing date the 2d of January, instant, or so much of the said sum as should eventually become payable under the terms of the said contract, and also the sum of 5000*l.* secured to him by the bond of the Rev. Henry Maxwell, or so much as should be eventually receivable from the said securities, and all benefit and advantage thereof, upon trust that they, the said Henry Norwood Trye, Thomas Henney, and William Charles King, or the survivors or survivor of them, or the executors or administrators of such survivor, did and should, when and as soon as the said several

¹ 15 Jur. 887.

Trye v. The Corporation of Gloucester.

sums should respectively become payable, or so soon as the same could be got in and received, call in and receive the same, and, after payment of such charges and expenses as they should from time to time be put to, lay out and invest the residue of such moneys, as the same should come to their hands, in the purchase of government or parliamentary stocks or funds, in the name of them, his said trustees; and did and should from time to time vary and transpose the said stocks and funds so to be purchased for others of a like nature, when and so often as they should think fit; and did and should stand possessed of all and singular the said stocks and funds, and the interest, dividends, and proceeds thereof, upon the trusts and for the purposes thereafter expressed and declared of and concerning the same; that is to say, upon trust that they, his said trustees or trustee for the time being, did and should from time to time, during the life of his wife, Johanna Ollney, lay out the dividends, interest, and proceeds of the said trust funds in the purchase of other government stocks or funds, in their or his names or name, so that the same might accumulate by way of compound interest; and immediately after the decease of his said wife, then did and should transfer so much of the said trust funds as should be equal in value to the sum of 8000*l.* sterling, into the names of the mayor and corporation of the city of Gloucester, who should stand possessed thereof upon the trusts and for the purposes thereafter expressed and declared of and concerning the same; that is to say, upon trust that they, the said mayor and corporation, did and should thereout, in the first place, raise the sum of 1300*l.*; and he directed that the said sum of 1300*l.* should, in the event of any land being given or granted to the said mayor and corporation of Gloucester for the purposes of his charity within the period of ten years next after his decease, under the provisions of the 9 Geo. 2, c. 36, intituled "An Act to restrain the Disposition of Lands, whereby the same became inalienable," be laid out and expended in or towards the erecting and building, finishing and rendering habitable, a substantial hospital or almshouse for the city of Gloucester, according to the scheme or plan which he had drawn up and signed for the due regulation of those hospitals or almshouses which he intended should be founded and established in due time after his decease; and he directed that the residue of the said sum of 8000*l.* should be held, for the benefit of the said city of Gloucester, upon the trusts declared by him in his said scheme or plan for the foundation and endowment of the said respective almshouses. And he further declared, that his said trustees or trustee for the time being did and should, with all convenient speed, when and as the said principal trust moneys, stocks, and funds, and the accumulations thereof should, after such purpose as last aforesaid, be sufficient, transfer so much thereof as should be equal in value to the sum of 8000*l.* sterling, into the names of the corporate body, or (if none) into the names of the ministers and church-wardens of each and every of the several places thereafter mentioned—that is to say, Cheltenham, Tewkesbury, and Winchcomb; and he did declare, and his will and mind was, that such corporate body (or ministers and church-wardens, as the

Trye v. The Corporation of Gloucester.

case might be) did and should respectively stand and be possessed of and interested in the said stock so to be respectively transferred as aforesaid, or such sum of 8000*l.*, upon and for the like trusts, intents, and purposes, and with, under, and subject to the like powers, provisions, and declarations, for the benefit of such several and respective places as were thereinbefore by him expressed and declared with regard to the said stock or sum of 8000*l.* which he had before directed to be transferred over or paid to the mayor and corporation of the city of Gloucester. And he did thereby declare, that in case the said principal trust moneys, stocks, funds, and securities, and the eventual accumulations thereof, should be insufficient to answer the purpose of raising such several and respective sums of 8000*l.* for the purpose of founding almshouses in each of the said places,— Gloucester, Cheltenham, Tewkesbury, and Winchcomb,— then and in such case it was his wish that the funds given for the founding of such almshouses should not abate in proportion, but that full payment should be made to the several places in the order and priority in which they were there named and placed, and that the deficiency, if any, should in the first place fall upon the last-named place, and then upon those places in succession from the last-named place. And he further declared, that in case there should be any surplus of the said principal trust moneys, stocks, funds, and securities, and eventual accumulations thereof, his said trustees or trustee for the time being did and should stand and be possessed of and interested in the same upon and for the trusts, intents, and purposes thereafter expressed and declared of and concerning his residuary real and personal estate thereafter by him devised and bequeathed; provided always, and he thereby declared, that no part of the said trust moneys, stocks, funds, and securities should be in any respect applied, or attempted to be applied, for the purpose of procuring or purchasing land upon which to build or erect any of the said hospitals or almshouses.

And he did thereby further declare, that in the event of no land or site being respectively granted or conveyed for the purposes aforesaid within the period of ten years next after his decease, then and thenceforth so much of the said principal trust moneys, funds, and securities as should eventually become incapable of being applied for the purposes aforesaid, should sink into his residuary and personal estate, for the benefit of his residuary legatees thereafter named. And the said testator, after giving certain pecuniary legacies for charitable purposes, and directing that the several and respective sums thereby by him given for charities should be paid out of his moneys and other personal estate not arising from or secured upon land, as to all the rest and residue of the said trust moneys, stocks, funds, and securities, subject to any further legacies which he might thereafter give by any codicil to his said will, the said testator gave the same unto the said Johanna Ollney, and to Margaret Powell and William Read King, for their own benefit, as tenants in common, and not as joint tenants, and appointed his said trustees executors of his will. The testator annexed to his said will a testamentary paper or writing, duly executed and attested, which contained a scheme for the management

Trye v. The Corporation of Gloucester.

of the almshouses intended to be founded by him; and he also made and published a codicil to his said will, bearing date the 9th of January, 1836, but which did not affect the questions in the cause. The testator died on the 16th of January, 1836, and his widow died in 1838. No land was given or granted for the purposes of the almshouses intended to be founded by the testator in Gloucester, Cheltenham, Tewkesbury, and Winchcomb, till January, 1846. By four several indentures, dated respectively the 10th of January, 1846, the 12th of January, 1846, the 12th of January, 1846, and the 13th of January, 1846, certain pieces of land, situate at or near Cheltenham, Gloucester, Tewkesbury, and Winchcomb respectively, were gratuitously conveyed by certain persons to the respective parties nominated in that behalf by the testator, for the purpose of having almshouses or hospitals erected thereon respectively. These indentures were all enrolled, pursuant to the Mortmain Act, prior to the 16th of January, 1846, except that by which the land intended for the hospital at Gloucester was conveyed to the corporation of Gloucester. This indenture was not enrolled till the 21st of January, 1846, which exceeded by five days the period of ten years from the testator's death. In each case, the grantors survived twelve months after the execution of the several deeds by them. The present suit was instituted by the trustees named in the testator's will, to have his estate administered. The questions discussed were, first, whether a gift of money, to be applied for building and furnishing a hospital, in case land for the purpose should be given by a third party, was valid; and, secondly, whether, supposing such gift to be valid, the conditions contained in the testator's will, as to procuring grants of land for the purposes of his charities, had been complied with.

K. Parker and Elderton, for the plaintiffs.

Lloyd and Lewin, for the corporation of Gloucester, cited *Mather v. Scott*, 2 Kee. 172; *Dixon v. Butler*, 3 Y. & C. 679; *Henshaw v. Atkinson*, 3 Mad. 306; *Giblett v. Hobson*, 3 My. & K. 517; *The Attorney General v. Bowles*, 2 Ves. Sen. 547; *The Attorney General v. Tyn-dall*, Amb. 614; and *The Attorney General v. Downing*, Id. 571.

Walpole, Haigh, and Jolliffe, for other defendants, cited *The Attorney General v. Parsons*, 8 Ves. 186; and *Johnstone v. Swann*, 3 Mad. 457.

Roupell and Hall, for residuary legatees, cited *The Attorney General v. Whitchurch*, 3 Ves. 141; *Brodie v. Chandos*, 1 Bro. C. C. 444, note; *The Attorney General v. Nash*, 3 Bro. C. C. 588; and *The Attorney General v. Davies*, 9 Ves. 535.

June 24. SIR JOHN ROMILLY, M. R. The questions in this cause arise on the will of Colonel Ollney, made on the 3d of January, 1836, and the questions which arise are partly as to the true construction to be put on his will, and partly as to the construction which the court

Trye v. The Corporation of Gloucester.

is bound to put on the Statute of Mortmain, the 9 Geo. 2, c. 36. The facts are very short and simple. On the 3d of January, 1836, Colonel Ollney made his will, which, so far as is material, is to this effect: After giving certain legacies, he gave 36,000*l.* secured by a contract with William Charles King, and 5000*l.* secured by a bond of Mr. Maxwell, to three trustees, upon trust to call in and invest these sums in the funds, and then upon trust to pay the dividends to his wife for her life; and after her decease he proceeds in the words following: "Do and shall transfer so much of the trust funds as shall be equal in value to the sum of 8000*l.* sterling into the names of the mayor and corporation of the city of Gloucester, who shall stand possessed thereof upon the trusts and for the purpose hereinafter expressed and declared of and concerning the same; that is to say, upon trust that they, the said mayor and corporation, do and shall thereout, in the first place, raise the sum of 1300*l.*; and I direct that the said sum of 1300*l.* shall, in the event of any land being given or granted to the said mayor and corporation of Gloucester for the purpose of my charity within the period of ten years next after my decease, under the provisions of the 9 Geo. 2, c. 36, intituled 'An Act to restrain the Disposition of Lands, whereby the same become inalienable,' be laid out and expended in or towards the erecting and building, furnishing and rendering habitable, a hospital or almshouse for the city of Gloucester, according to the scheme or plan which I have drawn up and signed for the due regulation of those hospitals or almshouses which I intend shall be founded and established in due time after my decease; and I direct that the residue of the said sum of 8000*l.* shall be held for the benefit of the said city of Gloucester, upon the trusts declared by me in my said scheme or plan for the foundation and endowment of the said respective almshouses." He then gave similar sums of 8000*l.* each to the corporations of Cheltenham and Tewkesbury, and the church-wardens of Winchcomb, which were for similar purposes; and he adds a proviso in these words: "Provided always, and I do hereby declare, that no part of the said trust moneys, stocks, funds, and securities shall be in any respect applied, or attempted to be applied, for the purpose of procuring or purchasing land upon which to build or erect any of the said hospitals or almshouses; provided, and I do hereby further declare, that in the event of no land or site being respectively granted or conveyed, for the purposes aforesaid, within the period of ten years next after my decease, then and thenceforth so much of the said principal trust moneys, funds, and securities as shall eventually become incapable of being applied for the purposes aforesaid shall sink into my residuary real and personal estate, for the benefit of my residuary legatees hereinafter named." He then leaves a great number of legacies to various institutions and towns, amounting in the whole to 8000*l.*; and, after giving some small legacies to his relations, he gave all the residue, subject to any further legacies he might give, to his widow, Margaret Powell, and William Read King, as tenants in common. The testator executed a codicil six days after his will, which does not affect the questions in the cause further than that he gave directions respecting

Trye v. The Corporation of Gloucester.

the establishment of the charity; and he died on the 16th of the same month, a few days after he executed this codicil. The bill is filed by the trustees, asking the direction and sanction of the court as to the course to be pursued; and the contest in question lies between the co-defendants and the residuary legatees on the one side, and the three corporations and the parish of Winchcomb on the other. The bill was filed on the 31st of May, 1848, and, under the direction contained in the decree, the money is in the course of being got in; and the facts necessary for the decision of the question have all been found by the master.

The facts which have occurred since the testator's death are shortly these: Four pieces of land have been conveyed to the three corporations, and to the vicar and church-wardens of Winchcomb, in the month of January, 1846, within ten years from the day of the death of the testator; and in every case, excepting that of the corporation of Gloucester, the deed has been duly enrolled within the ten years specified in the will. In the case, however, of the corporation of Gloucester, the deed was enrolled on the 21st of January, being five days after the ten years had expired. The grantors in every case have lived upwards of twelve months after the date of the deed of conveyance; and consequently, so far as the Statute of Mortmain is concerned, the deeds are good and effectual conveyances of the lands they purport to convey. The first question raised is, whether they can be considered as coming within the directions contained in the will of the testator, as it was impossible, on the day the ten years expired, to say that the conveyances had been perfected; and with respect to Gloucester in particular, from the circumstance of the non-enrolment, it was, as it is alleged, incomplete. With respect to all those points, I think no difficulty or doubt whatever exists, and that, whatever might be the state of the property during that intermediate period that elapsed between the execution of the grant and the ultimate enrolment within six months, and the survivorship of the grantor for twelve months, all the authorities, as well as reason and principle, concur in saying, that, whether the deeds are made good or bad by the compliance or non-compliance with the necessary conditions imposed by the statute, the validity or invalidity must, for all purposes, date from the day of the execution of the deeds.

I am therefore of opinion, in this case, that as the deeds were duly enrolled within the six months, and as the grantors all survived for twelve months after the date of the conveyances, the deeds were good and effectual deeds from the day of the due execution; and that, in particular, the deed conveying the land to the corporation of Gloucester was, on the 12th of January, 1846, and has since continued to be, a good and effectual conveyance for all purposes. I consider this to be so well settled, that I have been unwilling to go through the authorities cited to me on the subject at the bar, more particularly as I shall have to refer to several authorities with respect to a subsequent part of the case. The circumstance, that the grantors might defeat the conveyances (if, in truth, they could defeat them, as to which I give no opinion) by conveying the land to a purchaser for

Trye v. The Corporation of Gloucester.

valuable consideration, does not, in my opinion, affect the question. If the conveyance had taken place before the will of the testator, and he had directed the money to be laid out in the lands so conveyed, I should not have hesitated to consider the bequest good; and yet the same question might have arisen if the grantor of the land had been then alive. The remaining question is, whether the bequest is good, having regard to the Statute of Mortmain, and to the circumstance that the bequest is made on the condition that lands should be granted for the purpose of enabling the bequest to be carried into effect. This is a question of considerable difficulty, depending entirely on the principle to be extracted from the numerous decisions which have been pronounced by the court on the construction of this statute, the 9 Geo. 2, c. 36, with regard to cases of this description.

In order to make my decision intelligible, I have thought it necessary to go through many of these cases. Before doing so, I will state how far I consider the law to be settled. I consider these two propositions to be established conclusively by all the late authorities: First, that a bequest to lay out money in the erection of buildings, without more, presupposes that a portion of the bequest must be applied in the purchase of land for this purpose; and that this, therefore, comes within the prohibition contained in the Statute of Mortmain, and that the bequest is void. Secondly, that a bequest to lay out money in the erection or repair of buildings upon land already in mortmain is not within the prohibition, but is a valid and effectual bequest. The question I have to consider is, whether the bequest is good when it is so framed as to induce some other person to give land in mortmain, and where the testator provides that the bequest is not to take effect unless the inducement so held out shall prove effectual. The authorities which bear directly or indirectly on this subject are very numerous; and I think it necessary shortly to notice those that bear directly upon the subject. The first case is *Sorresby v. Hollins*, 9 Mod. 221. In that case, a direction to secure an annuity to the poor of Leek, either by the purchase of land of inheritance or otherwise, as the executor should be advised, was held by Lord Hardwicke to be a good bequest, by reason of the words "or otherwise;" and he stated, that in this act of Parliament there is no authority to construe a bequest void if by law it can possibly be made good; and I cite this case rather for this observation as to the construction of the bequest with reference to the statute than for the points expressly decided in it. In *Gastrell v. Baker*, 2 Ves. Sen. 185, a bequest of residue to trustees, in order and towards erecting a school, was held by Lord Hardwicke to be a good bequest. In *Vaughan v. Farrar*, Id. 182, Lord Hardwicke also held, that a bequest of personal estate for erecting a hospital was not void within the statute. In *The Attorney General v. Bowles*, Id. 547; 3 Atk. 806, a testator gave 500*l.* upon trust, to lay out part in erecting a small school-house, and a little house adjoining for the master to live in, the whole purchase and building not to exceed 200*l.*, the remaining 300*l.* to be laid out in the purchase of land, or on some real security, for the maintenance of the master. Lord Hardwicke held, according to the report in

Trye v. The Corporation of Gloucester.

Vesey, Sen., that the 300*l.* was void; but as to the 200*l.*, if they could get a piece of ground by gift, on the generosity of any person, — not by purchase, — they might be at liberty to apply to the court to lay out 300*l.* in erecting a school-house upon it. As to this, it may be observed, that Lord Hardwicke has expressed in his judgment nearly what the testator has here expressed in his will.

It is clear, therefore, consistently with the case, and with the cases I have already cited, if it be law, that this would be a good bequest. According, however, to the report in Atkyns, Lord Hardwicke held that the money could only be laid out in case there existed some piece of land in mortmain already in the parish, on which the school might be erected. In *Chubb v. The Attorney General*, Amb. 373, a bequest to build a parsonage-house on existing glebe was held by Sir T. Clarke to be a good bequest. *The Attorney General v. Tyndall*, of which I have three reports, — one in Amb. 614, a second in 2 Eden, 207, and also some private manuscript notes, which came to me from the possession of my father, (but by whom those notes were made I am unable to state,) — has been considered a sort of leading authority upon the subject, and appears to have been the subject of repeated comment in the subsequent cases. It certainly altered the precise law, as it is to be gathered from the decisions which I have already referred to, and it contains some propositions which have not received confirmation. The testatrix, in that case, expressly directed land to be purchased, and almshouses to be erected, on the land so purchased; so that there was little doubt but that, according to all the authorities, the gift, so far as regarded the purchase of land, was bad; and the other gift, depending on that, would fail also, and would have been so decided by Lord Hardwicke, and Lord Henley accordingly so decided, and in doing so, though it was not necessary for his decision, he laid the rule down broadly thus — that a bequest to lay out money in erecting buildings, even if the land is already in mortmain, would be bad, because building on an existing site is laying out money on realty, and is, therefore, contrary to the spirit of the statute, because it improves the site, and because it is demandable on a writ of right, and is, therefore, a purchase of so much realty. This is certainly not law, according to the modern decisions; and the importance of this decision is rather from the manner in which it has been treated by subsequent judges, for the observations of Lord Henley were not necessary to the decision; and he seems also to have felt some little warmth in deciding the case, with reference to his observations on the House of Lords. It is true, in the case in Eden it is stated that that does not appear in the manuscript note, and is supposed not to have been stated; but in the manuscript note which I have of the judgment, which is evidently a third report, the same observations are contained. It is possible, therefore, he might have thought that it was desirable to omit that subsequently. In the subsequent case, also, of *The Attorney General v. Downing*, Amb. 571, Lord Northington seems desirous to support the case of *The Attorney General v. Bowles*, for he states that that case, and the case of *The Attorney General v. Tyndall*, are not inconsistent with each other;

Trye v. The Corporation of Gloucester.

and in the decision I think they are not so. The case of *Pelham v. Anderson*, 2 Eden, 296; 1 Bro. C. C. 444, which was a bequest to build a hospital, was held to be void; and in *Brodie v. The Duke of Chandos*, a bequest to build a new parsonage-house on land already in mortmain was held to be good. In *The Attorney General v. Hyde*, Amb. 571, the testator gave 200*l.*, to be laid out under the direction of the minister and church-wardens of Royston, for erecting a free school, and that when built, 2000*l.* should be applied for the support of it.

It appeared that there was a piece of land in Royston already in mortmain, on a part of which there was a school-house standing, and which might be applicable for this purpose. Lord Apsley in his judgment reviewed the former decisions, and laid down this as the broad distinction—that a gift to build on land already in mortmain was good, but a gift to build generally imported buying as well as building, and was, therefore, bad; and he held that *The Attorney General v. Bowles* had been overruled by *The Attorney General v. Tyndall*. I consider the law, as to this point, to be in a great measure settled by this case. This distinction which he pointed out has prevailed since in all the subsequent cases. In *The Attorney General v. Nash*, 3 Bro. C. C. 588, a bequest to build a school was held to be void, and a demurrer to the information was allowed accordingly; and so Lord Eldon states in 8 Ves. 191, solely upon the ground of the presumption already stated, that you ought to infer, where the testator is silent, that he meant land to be purchased. In *The Attorney General v. Whitchurch*, 3 Ves. 141, Lord Loughborough held that *The Attorney General v. Bowles* had been shaken by subsequent authorities, and he concurred in dissenting from it. *The Attorney General v. Parsons*, 8 Ves. 186, repeated and confirmed, that a bequest of money to be laid out in making or repairing a building was good, so far as applicable to land already in mortmain, but bad to the extent that it went beyond that. It contains, however, a remarkable expression in Lord Eldon's judgment, which, to some extent, is favorable to the case of the charities in this case. He says, "I agree with the late cases, which go a great way to establish that the court cannot put such a construction upon the word 'erect' as was put upon that word in former cases, and that *prima facie* a testator must be taken to mean, by that word, that land shall be bought. I think the good sense is with the later cases, requiring that the testator himself should have manifested his purpose to be sufficiently answered if they could hire or beg land, according to the expressions in the different cases." I will consider the effect of this expression when I comment upon the case of *Henshaw v. Atkinson*; but, taking these words by themselves, it would appear as if Lord Eldon thought, that if the testator pointed out they might hire or beg the land, that would make a good bequest. *The Attorney General v. Davies*, 9 Ves. 535, is a very important case. There the testator gave the sum of 5000*l.*, more or less, as it may be wanted, to build twelve almshouses, and purchase the ground, six for poor men, and six for poor women, economy and convenience to be observed in the structure. Then he also gave as follows: "After the

Trye v. The Corporation of Gloucester.

foregoing bequests are discharged, and any thing further that may occur of that sort, I give all the remainder of my property for the use of the Orphan School in the City Road, under the direction of the committee for the time being, provided they will furnish a piece of ground, near the said school, to build the aforesaid houses on, and the committee to take the management of them and all my affairs, which is not great; and if it is not agreeable or convenient for them to do so, I request the following to accept of the trouble of fulfilling my desire." Then he makes some further statement. Sir William Grant held this to be void, on the ground that the residue was given to the charity on condition that they furnished the ground. He states, "It is unnecessary to consider, however, in this case, how far that opinion, contrary to Lord Hardwicke's," that is, in *The Attorney General v. Tyndall*, "may be well founded, for the provision of this will is not merely that if land shall be given these almshouses shall be built, but he proposes to the committee a gift, and offers them the residue as a consideration for their furnishing lands for his almshouses, and taking the management of them and his affairs." It would take me too long to read the reasons for his coming to that conclusion. Lord Eldon, in affirming this judgment, makes this observation, 9 Res. 544, which is of great importance: "Whatever were the decisions formerly, when charity in this court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that, unless the testator distinctly points to some land already in mortmain, the court will understand him to mean that an interest in land is to be purchased, and the gift is not good." In *Johnstone v. Swann*, 3 Mad. 457, it was held, that a sum of money that was left to be invested, and the dividends applied in procuring a school-house, was good, inasmuch as this bequest pointed to hiring the school-house, and not to putting any land in mortmain. And in the case of *Henshaw v. Atkinson*, 3 Mad. 306, which was decided five months before by the same judge, a case which at first sight appears to have a very material and controlling effect upon this case, the testator states his wish, that a blue-coat school shall be erected at Oldham, and a blind asylum at Manchester, and he gives 20,000*l.* in trust to trustees for the use of the charity, and directs that the money shall not be applied in the purchase of lands, it being his expectation that other persons will, at their expense, purchase lands and buildings for those purposes; and then he gave all the remainder of his personal estate in trust for these charities. He afterwards, by his codicil, points out that he does not expect that any land whatever shall be given. The reasons given, in the printed report, by the vice chancellor for his decisions are not, to my mind, very full or satisfactory, but he seems to have decided it solely upon the ground that the second codicil showed, that although originally the testator might have contemplated the land would be required for the purpose of the charities, yet afterwards, when he made his second codicil, he was of a different opinion; he, therefore, directed only the interest to be paid to the trustees for the maintenance and the support of the charities. This was commented upon

Trye v. The Corporation of Gloucester.

by Sir T. Plumer in the case of *The Attorney General v. Hinxman*, 2 J. & W. 270, which is only material so far as it relates to this. In *The Attorney General v. Hinxman* there was a bequest, which would have been good as it stood originally, but being inseparably connected with one that was bad, the whole failed. Sir T. Plumer said, in giving his judgment, that "if the case could be brought up to *Henshaw v. Atkinson*, where there were negative words showing the intention to be what is contended for here, that the money should not be applied to the purchase of keeping in repair any real estate, if it appeared, as it did then, that the bequest was intended to form an auxiliary fund, to go in aid of other donations, on the supposition that some other person would give a house, we should then be relieved from the difficulty." These observations show that Sir T. Plumer did not consider that the case of *Henshaw v. Atkinson* established any thing more than this proposition, namely, that a bequest in favor of a charity expressly directing that no portion of the bequest should be applied to land, but providing that if, at any future time, some person should give land to the charity, this bequest might be made available in erecting or repairing buildings on that land, was a good bequest, and one of which this court would execute the trusts. Assuming that to be decided, it is very much in accordance with the supposed case suggested by Lord Eldon in his judgment in *The Attorney General v. Parsons*, to which I have already referred. It would also be very near the present case, and yet it would be scarcely consistent with the rule laid down by Lord Eldon in *The Attorney General v. Davies*, which I have already read, if that rule is to be carried to its fullest extent. Still, some material distinctions exist between that case and the present. The bequest in *Henshaw v. Atkinson* was to take effect at all events, even though no land should be obtained; and no portion was to be applied in obtaining land, nor any direct encouragement held out for that purpose. But in the case before me, though it is directed that no portion of the bequest is to be expended in the purchase of land, yet the bequest is to fail altogether unless land can be obtained from other persons to be put in mortmain, and it is expressly conditional on that event. This has never been decided to be good, and is, as I have already stated, opposed to the *dicta* which I have read of Lord Eldon. In *Pritchard v. Arbouin*, 3 Russ. 456, Lord Lyndhurst expressly stated the rule to be as laid down by Lord Eldon, namely, that unless the testator expressly pointed to land already in mortmain, a bequest to build and repair could not be sustained. *Giblett v. Hobson*, 5 Sim. 651; 3 My. & K. 517, is an important and material case, but principally for the observations contained in the judgment. The bequest was in these words: "I give and bequeath to the Butchers' Charitable Institution the sum of 5000*l.*, towards building almshouses to the said institution." This was held to be void, in conformity with the older cases, because it assumed that land must be purchased in order to enable the legacy to take effect. Though the decision in that case does not positively bear upon the present, some of the observations of Lord Brougham are very important and material as to the general policy

Trye v. The Corporation of Gloucester.

of the act. He observes, that "placing land in mortmain is the object against which the act is pointed; that money is equally forbidden to be applied for the purpose of buying land, because that would indirectly put land purchased in mortmain. So charitable bequests, to be invested in real securities, are equally forbidden, in consequence of their tendency to bring land by foreclosure into the perpetual ownership of a corporate mortgagee." It appears, therefore, to have been Lord Brougham's opinion, that any bequest which directly tended to put land in mortmain would be a contravention of the statute. *Mather v. Scott*, 2 Kee. 142, is a most important case; the bequest there was, "As to all the residue of my property, I give the same to the chaplains of his majesty's dock yard at Devonport, and of the royal hospital at Stonehouse, in conjunction with my executors, with a request that they will be pleased to entreat the lord of the manor, either at Devonport or East Stonehouse, to grant a spot of ground suitable for the erection of as many decent dwellings or rooms." And then it provides how they are to be built. The testator evidently did not here contemplate the purchase of land. He does not expressly prohibit it; but he expects that the land can be obtained, to use the expression of Lord Eldon in *The Attorney General v. Parsons*, by begging from the lord of the manor. Lord Langdale, M. R., went carefully through the authorities. He did not, as it appears to me, consider the casual expressions of Lord Eldon in *The Attorney General v. Parsons*, nor the case of *Henshaw v. Atkinson*, as conclusive on the case; but, on the contrary, having reviewed all the cases, he laid down the rule thus, that the bequest was void unless it pointed expressly to land already in mortmain. He then adds this passage, which, if it be the law, is decisive, in my opinion, of the present case. It is at the end of his judgment. "It is said, that the direction of the trustees, to be pleased to entreat the lord of the manor to grant a piece of ground, does not bring the case within the principle; but I am of opinion that, if the testator intended to exclude a purchase, he has failed to express his intention, and that it is contrary to the policy of the Mortmain Act to permit testamentary gifts of money to be laid out on land as an inducement to draw land into mortmain. I am of opinion, upon the first point, that the language of the bequest is not sufficiently express; and upon the second, that the charitable gift must fail." There is but one further authority to which I intend to advert; but before I do so, I pause to consider the effect of the cases to which I have already referred. The current of the later decisions at least has been express, bearing stronger and stronger, and concluding with the last, that whatever acts as a direct inducement to put land in mortmain is a void bequest; and, with the exception of the case of *Henshaw v. Atkinson*, on which I express no opinion as to whether that case would now receive the same decision as it did then, — but which, as it appears to me, is easily distinguishable, so as to be consistent with all the other decisions, though not possibly with all the *dicta* to be found in those cases, — the rule to be deduced from these decisions, laying aside some casual expressions, appears to be that stated by Lord Eldon in the case of *The Attorney General v.*

Trye v. The Corporation of Gloucester.

Davies, to which I have already referred, that, unless the testator distinctly points to some land already in mortmain, the court will understand him to mean that an interest in land is to be purchased, and that the gift is not good; and this rule is confirmed by Lord Lyndhurst and Lord Langdale. I am therefore of opinion that I could not declare this legacy to be good, without being prepared to state my opinion that the cases of *Mather v. Scott* and *The Attorney General v. Davies*, decided by Lord Langdale, Sir William Grant, and Lord Eldon, were not law — at least to this extent, that the case of *Mather v. Scott* was not law; and with respect to the second case, that the *dicta* in it would not be considered law, unless very much restricted in respect of what is there laid down. The difficulty in this case, however, is not, in my opinion, concluded, for there still remains one case on which I must make two or three observations. This is the case of *Dixon v. Butler*, 3 Y. & C. 679. This case, as it stands reported, is one of a very singular description.

As it appears to me, no arguable question in reality existed in that case. The bequest was expressly made good, by the stat. 43 Geo. 3, c. 108, which had been passed by the legislature precisely to meet bequests of that nature, because, in the opinion of the legislature and of conveyancers, such bequests would be invalid unless sanctioned by statute; and yet the counsel seem to have argued the case, and the court seems to have reserved its judgment, in entire ignorance of the existence of that statute. The learned judge accordingly, in giving judgment, having apparently observed the statute subsequently to the argument, states, at the close of his observations, that the stat. 43 Geo. 3, c. 108, determines the question in the case. His previous observations, therefore, are rather to be considered as *obiter dicta* than as actually deciding the point. They are, however, from the great ability of that eminent judge, entitled to the greatest weight. He states the principle of all the cases to be this, in p. 681: "But I apprehend, where a testator gives money to be laid out on land already purchased by others for such building, or on land to be given by a third person for that purpose, and the trustees have only authority to lay out the money in building on such land so procured, and cannot employ it in procuring such land, the bequest, if such an object appear clearly from the language used in the testator's will, is good; for then the word 'build' is not to be taken in its extended sense, as including the purchase of the land, but it is by the language of the testator applied specially; mere cost of erecting, as contradistinguished from procuring the land on which such erection is to take place."

With the greatest respect and deference to the opinion of that learned judge, I cannot say that I have come to the same conclusion as to the result of the previous cases; and I cannot reconcile the observations I have just read with what was decided by Lord Langdale in *Mather v. Scott*, with what was laid down by Lord Brougham in *Giblett v. Hobson*, neither of which cases appears to have been cited before the learned baron; nor can I reconcile it with the principle laid down by Lord Eldon in *The Attorney General v. Davies*,

Early v. Middleton.

nor by Lord Lyndhurst in *Pritchard v. Arbouin*. I am, therefore, unable to reconcile this authority with the former ones, — I mean the former ones of a later description, — because those of the earlier decisions of Lord Hardwicke undoubtedly would support that view of the case. If I agreed with it on principle, and dissented from the other authorities, I should even then feel great difficulty in resisting what appears to me to be so strong a body of decision by such eminent judges; but as I concur with the principle enunciated by those decisions, and as I believe that the only clear and intelligible mode of construing the Statute of Mortmain, so as to give it a consistent rule and a test easily applied by which to ascertain the validity of bequests of this nature, is by adopting the rule laid down in those authorities, I am compelled to follow them in that which I consider they have decided. In order to facilitate an appeal in this case, and in order that the grounds of my decision may be as clear and distinct as I can make them, I state my opinion to be, that according to the decided cases and the true construction of the stat. 9 Geo. 2, c. 36, a bequest is void which tends directly to bring fresh land into mortmain; and also, that a bequest of money, to be expended in the erection or repair of buildings, is void also, unless the testator in his will expressly states his intention that the money so bequeathed is to be expended upon some land already in mortmain. This bequest, in my opinion, offends against both these principles. It is, therefore, in my opinion, void; and I am prepared to make a declaration to that effect, and to give the consequential directions. I cannot, however, conclude this case without observing, that it is of great importance that the principle on which gifts of charities can be supported should be settled; and that, as this is a case in which the property is of large amount, it would, in my opinion, be a very proper case to carry to a higher tribunal; and with this view, and to assist the parties against whom I decide, I have endeavored to make the grounds of my decision as plain as possible. This is a matter, however, to be left to their discretion. I can only make the decree as I have already stated, and give the costs of all parties out of the estate.

EARLY v. MIDDLETON.¹

June 25, and August 7, 1851.

Will — Construction of.

A testator, by a codicil to his will, gave legacies of 500*l.* each to four children, by name, of his niece, Alice Early, the eldest daughter of his brother Henry, and he directed his executors to pay, out of his personal estate, the sum of 500*l.* apiece to each child that might be born to either of the children of either of his brothers, to be paid to each of them on his or her attaining the age of twenty-one years. The testator's niece, Alice Early, besides the four children named in the codicil, had three other children living at the date thereof: —

Held, that those children were not entitled to a legacy of 500*l.* each, as the words of the codicil contemplated only children who might be born subsequently to the date of it.

¹ 15 Jur. 867.

Early v. Middleton.

WILLIAM TOWNSEND, by his will, dated the 31st of March, 1827, after giving several legacies, bequeathed the residue of his personal estate to trustees, whom he appointed his executors, upon trust, with all convenient speed after his decease, to sell and convert the same into money, and after payment of his debts, &c., to invest certain sums in government or real securities, for certain purposes therein mentioned, and pay and divide the residue of the proceeds of his personal estate among his next of kin living at his decease.

By a codicil to his will, dated the 14th of November, 1827, the testator disposed of his real estate, and amongst other devises he thereby devised to John Early and Alice his wife, the eldest daughter of his, the testator's, brother, Henry Townsend, by his first wife, and the survivor of them, a certain copyhold property, to hold to them, the said John Early and Alice his wife, and the survivor of them, for the term of their natural lives, and the life of the survivor of them; and after the decease of such survivor, then he gave and devised the same unto William Townsend Early, their eldest son, his heirs and assigns forever.

By another codicil, dated the 10th of March, 1832, the testator gave and bequeathed the sum of 2000*l.* to his executors, to be by them invested in the public funds or government securities, and the dividends and proceeds thereof to be from time to time applied for and towards the support of the six aged women that might from time to time be the inmates in the almshouses built by him at Witney, in the county of Oxford; and also for and towards keeping the said almshouses in constant repair; and he gave and bequeathed to Hannah Maria, the daughter of his brother Henry, the sum of 600*l.*, to be paid to her by his executors on her attaining the age of twenty-one years, and which he desired to be considered as additional to what he had bequeathed her in his said will or codicil; and he gave and bequeathed to Elizabeth, the daughter of Henry Townsend, the sum of 1000*l.*, to be paid to her by his executors on her attaining the age of twenty-one years; and he gave and bequeathed to Ann, the daughter of Henry Townsend, the sum of 1800*l.*, to be paid to her by his executors on her attaining the age of twenty-one years; and he gave and bequeathed to Alfred, alias Henry, the son of Henry Townsend, the sum of 500*l.*, to be paid to him by his executors on his attaining the age of twenty-one years; and he gave and bequeathed to Edward, the son of John and Alice Early, of Newland, in the parish of Coggs, in the county of Oxford, blanket manufacturer, the sum of 500*l.* for his own use and benefit; also he gave and bequeathed to Alice, the daughter of the said John and Alice Early, the sum of 500*l.* for her own use and benefit; also he gave and bequeathed to Mary, the daughter of the said John and Alice Early, the sum of 500*l.* for her own use and benefit; also he gave and bequeathed to Sarah, the daughter of the said John and Alice Early, the sum of 500*l.* for her own use and benefit; also he gave and bequeathed to Ann, the daughter of Robert and Martha Storrs, the sum of 500*l.* for her own use and benefit.

The testator then proceeded as follows: "Item — I direct my execu-

Early v. Middleton.

tors to pay, by and out of my personal estate exclusively, the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship."

The testator left three brothers and a sister him surviving. Besides the children named in the second codicil, there were three other children of John and Alice Early living at the date of the codicil, one of them being Martha Early, the plaintiff in this suit. A question arose upon the construction of the codicil as to whether the general bequest therein contained in favor of his brother's grandchildren extended to children born after the testator's decease; and this question was decided in the negative in the cause of *Storrs v. Benbow*, 2 My. & K. 46. Another question raised was, whether the children of Alice and John Early, named in the second codicil, were entitled to legacies under the above general bequest in the same codicil; and this was decided in the negative in the cause of *Early v. Benbow*, 2 Coll. 342. In the present suit, which was a claim filed by Martha Early, the child of John and Alice Early, who was living at the date of the second codicil, but was not named in it, the question was, whether the plaintiff was entitled to a legacy of 500*l.* under the general bequest in favor of the grandchildren of the testator's brothers. The claim was filed against the present trustees of the testator's will.

R. Palmer and *Bevir*, for the plaintiff. The question is, whether the words used by the testator are words so strictly applicable to the future as to exclude a child already born, and for whom no provision was otherwise made. The intention was to provide for all of a certain class, and there is no difficulty in holding that no child was to take a double legacy, consistently with the construction that all not previously named were to take under the general bequest. The court might give a large and liberal construction to the bequest, so as to include all born previously to the testator's death, and yet exclude any from taking a double legacy. In *Storrs v. Benbow*, it does not appear to have been suggested that there were any children living at the testator's decease except those who were named, and many of the cases bearing on the subject were not cited before the vice chancellor. [They referred to the following authorities: 2 Jarm. on Wills, 101; 2 Roper, 115, 117; *Hewet v. Ireland*, 2 Coll. 344, note; *Hibblethwaite v. Cartwright*, Cas. t. Talb. 31; *Doe v. Hallett*, 1 Mau. & S. 124; *Gardy v. Hibbert*, 19 Ves. 125; *Harrison v. Harrison*, 1 Ry. & M. 71; *Giles v. Giles*, 8 Sim. 360; *Jarvis v. Bond*, 9 Sim. 549; and *Manning v. Chambers*, 11 Jur. 466.]

Teed and *Shebbeare*, for the trustees.

August 7. SIR JOHN ROMILLY, M. R. This is the case of a claim of a lady of the name of Martha Early, who, having attained her age of twenty-one years, claims to be entitled to a legacy of 500*l.*, under a codicil of the 10th of March, 1832, made to the will of William

Early v. Middleton.

Townsend, the testator, which will bears date the 31st of March, 1827. The words of the codicil which raise this question are as follows: The testator gave to Edward, Alice, Mary, and Sarah, the children of John and Alice Early, the sum of 500*l.* for their own use and benefit; and he gave to Ann, the daughter of Richard and Martha Storrs, 500*l.* for her own use and benefit; and then it proceeds in these words: "Item — I direct my executors to pay, by and out of my personal estate exclusively, the sum of 500*l.*, to be paid to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship." The codicil, it is to be observed, gives legacies of 500*l.* to the four children of his niece, Alice Early; and he, by the codicil, made William Townsend Early, another son of his niece, devisee in reversion of the real estates after the death of his father and mother. There were living at the time of this codicil three other children of John and Alice Early. One of the children is the present claimant, Martha Early, who was born subsequently to the date of the will, and who, at the date of the codicil, was of the age of three years and three months, or thereabouts. The question is, whether these three children take any benefit under the words of this codicil — namely, "the 500*l.* apiece to each child that may be born to either of the children of either of my brothers." In *Storrs v. Benbow*, 2 My. & K. 46, this codicil came before the consideration of Sir John Leach, and Sir John Leach decided in that case, which is frequently referred to for the principle involved in it, that children born after the decease of the testator could not take any benefit under the will. He expressly stated, in fact, that the words "may be born" are to provide for the birth of children between the making of the will and the death. The question did not arise, whether the codicil gave any interests to children existing at the time of the codicil; and although Sir John Leach uses the word "will," I am disposed to think that there was not present to his mind any such question as that of children born between the date of the will and the codicil, but that he used the word "will" in that case as synonymous with "codicil." He meant the testamentary paper of which he was then speaking. In the case of *Early v. Benbow*, 2 Coll. 342, this codicil was again made the subject of judicial decision. There was a bill filed by Edward, Alice, Mary, and Sarah, the four children of Mrs. Early, claiming a legacy of 500*l.* each — not merely those which were expressly given, but also further legacies, under the words of the codicil, "to each child that may be born to either of my brother's children;" and Knight Bruce, V. C., after carefully considering the subject, and giving an elaborate judgment, decided that this word "may" could not be read in so unrestricted a sense as to allow all those children of Mrs. Early as should be living at the death of the testator, including the four who had gifts already given to them, to participate in the bequests contained in these words. The question before me really amounts to this, whether I can read the word "may" to the extent of letting in

Early v. Middleton.

children who, being alive when the codicil was executed, are not mentioned in it. I am of opinion that this question is in reality concluded by the decision of the vice chancellor; and I think that both the decisions of the master of the rolls and the vice chancellor concur, and that both those judges considered that the words were prospective, and that they were descriptive of the persons to be born subsequently to the date of the codicil, and descriptive also of persons who were to be born subsequently to the date of the codicil, but previous to the death of the testator. The question which the vice chancellor had to consider was undoubtedly a question of very considerable nicety and intricacy; but it is impossible to make any distinction, in my opinion, between the children who are named and those who are not named in the codicil. It is useless to speculate in order to endeavor to ascertain what the testator's object could have been in selecting four only out of seven existing children, and including all the children that might afterwards be born during his life, and thus excluding three children, who, from their tender years, could not have given him any personal offence, or motive for excluding them. But, in my belief, one of the causes of erroneous constructions of a will is by not confining the attention of the court to an attempt carefully to discover the meaning of the words that the testator has used, but rather to consider what, in the circumstances of the case, it is probable that a reasonable man would and ought to have intended, and endeavor to mould the expressions to meet that construction. It appears to me to be an inconsistent, and to some extent an unreasonable, disposition of his bounty; but, finding the words before me, I cannot make a will for the testator, or go beyond what he has expressed. It would be wholly inconsistent with the decision of Knight Bruce, V. C., if I were to hold that the prospective words could apply to three out of seven existing children, and not to the others, simply because he had shown that those four were objects of his bounty, and that he had been silent with respect to the other three. I concur in the reasoning of the decision of the vice chancellor, and, in so concurring, I hold myself bound to decide that the reasoning and principles of that decision extend to the case of Martha Early, the present claimant, as well as to the brother and sister, who are not named as legatees in the codicil. The result is, that the claim must be dismissed, but without costs, and the defendants may retain their costs out of the estate.

Hutchins v. Hutchins.

HUTCHINS v. HUTCHINS.¹

May 12, 26, and 27, 1851.

Breach of Trust — Rate of Interest — Accounts — Rests.

Trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest at 5*l.* per cent., the accounts to be taken with rests.

THE plaintiff in this suit was R. H. C. Hutchins, and the defendants his uncles, the Rev. James Hutchins and the Rev. George Hutchins, and two other persons. The object of the suit was the payment of one sixth of the personal estate and one sixth of the produce of the real estate of the testator in the cause, and interest from the year 1830, and that the two uncles might pay the costs of the suit. The facts were these: In the year 1818, Charles Hutchins, (the father of the plaintiff,) an undergraduate at Oxford, left England for India, having enlisted as a private soldier in the East India Company's service. Before 1820, he procured his discharge, and became the head master of the grammar school at Strong, Calcutta, and held a situation in the Asiatic Museum there. In 1820, he married Ann White, the daughter of John White, a ship builder at Chittagong, by which marriage he had four children, viz., three sons, of whom the plaintiff was one, and a daughter. In 1827, Charles Hutchins, who with his wife had lived at Calcutta, removed with his family to Chittagong, and resided with his father-in-law, John White. From this place he went to Szigapatam, and died on board the *Dolphin*, on his voyage back to Chittagong, about August, 1828, his wife having died a short time previously. The four children of Charles Hutchins remained with John White, their grandfather, who afterwards removed to Calcutta, taking with him the four children, and also his own young children, two girls and one boy, the issue of a second marriage. Under the will of a maternal great uncle, Charles Hutchins was entitled, in the event of his surviving his mother, Martha Hutchins, to one sixth of personal estate and real estate directed to be sold; and in case he should not survive his mother, (which event happened,) such of his children who should attain twenty-one were entitled to the same in equal shares. In December, 1831, John White, by the desire of their uncle, the Rev. James Hutchins, sent the four children to England, where they were received by their uncles and aunts, the two brothers and two sisters of Charles Hutchins. Not long after the arrival of the children, the uncles and aunts, from certain statements made by the children, and from the complexion of three of them being somewhat different from that which the uncles and aunts had, by the letters of Charles Hutchins and John White, been led to expect, came to the conclusion that some other children had been substituted for the children of their brother, Charles Hutchins. This

¹ 15 Jur. 869.

Hutchins v. Hutchins.

conclusion was communicated to John White by James Hutchins, in a letter dated in November, 1832. Three of the children, (two sons and the daughter,) were shortly afterwards sent back to Calcutta, where they died. The plaintiff remained in England, and his friends in India for many years believed that he had been recognized by his uncles and aunts as their nephew. The plaintiff, by his uncles, was placed at school, under the name of Warner, and afterwards he received from James and George Hutchins 14s. per week, until the institution of the present suit, when the allowance was withheld, and the plaintiff became an inmate of the Brighton workhouse, he being a cripple from alleged neglect in childhood. In 1832 and 1833, Mr. Canham, a cousin of Charles Hutchins, endeavored to prove to the uncles that their suspicions as to the children were groundless, but without success. In 1832, a commission was appointed by the Governor General of India and the Bishop of Calcutta, to examine the matter and report upon the evidence, and the commissioners, in their report, dated September, 1833, stated that they were decidedly of opinion that no fraud had been practised, and that the children were the real children of Charles Hutchins and his wife. In 1842, the Rev. Mr. Morton, at the instigation of the uncles, made inquiries at Calcutta, and, in a letter dated in December in that year, told them that no proof was wanting of the truth of the parentage, giving a full statement of the evidence on which his opinion was founded, and concluding, "I really and honestly think the matter is free from reasonable doubt." The sum representing the share which the plaintiff claimed, as the only child of Charles Hutchins who attained twenty-one, amounted to 2184*l.* 18*s.* 6*d.* This sum had been paid by the trustee of the will, who was a defendant, to Messrs. James and George Hutchins, (they giving him an indemnity,) and was before the institution of the suit distributed by them as in default of a child of Charles Hutchins attaining twenty-one. The defendants, in their answers, stated the circumstances upon which they founded their belief of the plaintiff not being the child of their brother, Charles Hutchins; they denied that the weekly payments were made on account of any income due to the plaintiff, but as loans to him, and to save him from going to the parish; and they said that, since the end of 1832, they considered and treated the plaintiff as a stranger in blood. The sum which the plaintiff claimed was invested in 2400*l.* consols, and was transferred into court in this suit. Upon a reference to the master, to inquire whether the plaintiff and his brothers and sister were the children of Charles Hutchins, deceased, he found that they were. The cause was now set down upon further directions, there being no exceptions to the report. The case was argued on all the points, but does not seem important, excepting as to the rate of interest to be charged on the amount in the hands of the defendants, or what had been parted with in breach of their trust. On this point, the cases of *Forbes v. Ross*, 2 Cox, 113; *Mosley v. Ward*, 11 Ves. 581, and *Tebbs v. Carpenter*, 1 Mad. 290, 307, were cited by the plaintiff's counsel.

Ex parte Croxton; in re The Oundle Union Brewery Company.

Russell and Haig, for the plaintiff.

Wigram and Bellamy, for the defendants.

KNIGHT BRUCE, V. C., said that one of the defendants had broken his trust by placing the fund in the hands of those whose interest it was to dispute the ownership of the person really entitled; the others, who had been unsuccessful in suggesting, without any ground which could be represented as solid, their ignorance of the *status* and condition of their brother's family. A breach of trust of the grossest description had been proved against all the parties. The trustee who placed the funds in the hands of the others would be treated with great indulgence in not having an order for the payment of costs. He would be refused costs of any kind. The other trustees must pay all the costs of the suit to the present time. They would be allowed for all payments for the plaintiff's maintenance, and for that of his brothers and sister. The account would be taken with rests; and as the plaintiff elected to take the fund as money, the interest would be, as was justified by many such cases already decided, 5*l.* per cent. The cash and all the stock, excepting for the present 1500*l.*, would be immediately paid to the plaintiff. The accounts would be taken in the master's office.

*Ex parte CROXTON; in re THE OUNDLE UNION BREWERY COMPANY.*¹

March 25, 1851.

Joint-stock Companies Winding-up Acts — Contributory.

By the deed of settlement of a company, it was declared that no member should be liable after he ceased to be such; and that, after a transfer of his shares, he should not be liable for any previous obligations. The master, under an order for winding up the company, placed a transferror of shares on the list of contributories in respect of his shares up to the time of transfer; but, on appeal, his name was removed.

THIS was a motion, on behalf of Mr. George Croxton, by way of appeal from the decision of Master Richards. It asked that the decision of the master charged with the winding up of the above-named company, made on the 13th of March, instant, whereby the name of the said George Croxton was placed, or directed to remain, on the list or *addenda* to the list of proprietors, or contributories of the said company in respect of twenty-five shares of 25*l.* each, until the 21st of October, 1842, might be reversed, and that the name of the said George Croxton might be struck out of the list of proprietors or contributories of the said company, or that the said decision might be varied. The master inserted the name of George Croxton on the list of contributories, class 1, as a shareholder who had signed the deed, and paid on his shares in

¹ 15 Jur. 892.

Ex parte Croxton; in re The Oundle Union Brewery Company.

full, in respect of twenty-five shares of 20*l.* each, as liable in respect of those shares to the 10th of October, 1842; and on the same day the master put the name of Charles Frederick Yorke on the list of contributories, class 4, as a transferee of the same shares, as liable from the 10th of October, 1842. The transfer of the shares from Mr. Croxton to Mr. Yorke was made on the 10th of October, 1842, upon which occasion all the requisites of the deed of settlement, dated the 29th of September, 1836, were complied with. The 13th and 34th clauses of that deed were as follows: Clause 13. "That no member of the said company, his, her, or their executors, or administrators, shall in any case or event (as between himself, herself, and themselves, and the other members thereof) be answerable or liable for, or in respect of, any debts, calls, or demands upon the said company after he, she, or they shall have ceased to be a member or members of, or to have a share or interest in the capital stock of, the said company, in his, her, or their own right, or rights, or by representation, save only and except for, and in respect of, any sum or sums which he, she, or they shall or may be liable to pay, by reason of any forfeiture, penalty, or misconduct, under some clause or provision in these presents contained." Clause 34. "That from and immediately after any such transfer or assignment as last aforesaid shall be made of any share, or shares, the former or last proprietor thereof shall thenceforth be forever acquitted and discharged of, and from all covenants, agreements, regulations, obligations, and liabilities whatsoever, under or by virtue of these presents, for or in respect of the share or shares which shall have been by him, or her, or them so assigned, or transferred, save only in respect of any penalty, forfeiture, or liability which shall have been previously incurred by him, her, or them in regard thereto."

James Parker and Hislop Clarke, for the motion, relied on *Ex parte Salter*, 14 Jur. 966, and *Ex parte Sanderson*, 3 De G. & S. 66.

Bacon and Roxburgh, for the official manager.

Knight Bruce, V. C. I think, and probably the master thought, that, independently of the 34th clause, there is no question at all in the case. The language of the deed is clear, independently of that clause. Then, upon the construction of the 34th clause, if persons will use such language as is used here, it cannot be matter of surprise that different minds should differ in their interpretation of it. It so happens that the interpretation I put upon it is not that which the master has put upon it. As I read the deed, the 34th clause ought to be construed in accordance with the 13th, and so as not to contradict the 13th. The term "liability," in the 34th clause, I think, ought to be construed with reference to the 13th clause, and with reference to the words "penalty" and "forfeiture" which precede it in the 34th clause. I think, therefore, this gentleman's name cannot stand on the list. I do not wonder that there should be a difference of opinion upon words so expressed. The costs must come out of the estate.

Ex parte James; in re The North London Junction Railway Company.

*Ex parte JAMES; in re THE NORTH LONDON JUNCTION RAILWAY COMPANY.*¹

May 13, 1851.

Joint-stock Companies Winding-up Acts — Provisional Committee-man — Authority.

Provisional directors of a company took a lease of offices for the purposes of the company for a term, and the trustees executed the same. A subscribers' agreement was executed, but the company was subsequently dissolved. On the company being ordered to be wound up under the acts, a trustee claimed to be repaid rent he had paid since the dissolution of the company; but the court held, that, whatever the question between the directors might be, the company at large was not liable for the rent.

THIS was a motion made on behalf of Mr. William Boyce James, the interim manager of the above-named company, that the order or report of Master Brougham, dated the 17th of March, 1851, whereby the master allowed the state of facts, charge, and claim of John Bagshaw, Esq., one of the contributories of the company, in respect of the sum of 403*l.* 2*s.* 6*d.* charged to be due and owing to him, as also the claim of the said John Bagshaw to be indemnified from the consequences of having executed the counterpart of a certain lease, and to be repaid all sums of money and costs which he had paid or incurred in consequence thereof, after deducting the several amounts which he had received in respect of the said house, might be discharged. The company was provisionally registered on the 15th of May, 1845, and shortly afterwards a provisional committee, of which Mr. John Bagshaw was one, was appointed. The subscribers' agreement, dated the 7th of July, 1845, contained the following clauses: "That it shall be competent for the said committee of management, at any time or times, until an act of Parliament shall be obtained authorizing the said undertaking, to enter into any contract for the taking or purchasing of land or buildings of leasehold, freehold, or copyhold tenure, or any property which may probably be required for the purposes of the said undertaking, or which it may be deemed expedient by them to take or purchase for any purposes connected therewith, in consideration of such sum or sums of money, or in consideration of such yearly rent or rents, and generally for such considerations, and upon such terms in all respects, as the said directors shall think fit, but so that such contracts shall be entered into upon condition that such act shall be obtained." "That the said committee of management shall have full power to appoint, suspend or remove, and to reappoint bankers, &c., . . . and to enter into contracts and agreements for any purpose whatsoever connected with the undertaking, and which can be legally entered into." "That whether the said act or acts of Parliament shall or shall not be obtained, the several subscribers to the said undertaking shall and will save harmless and keep indemnified the said committee of management,

¹ 15 Jur. 893.

Ex parte James; in re The North London Junction Railway Company.

and every individual member thereof, from and against all costs and charges, damages, losses, and expenses which they, or any or either of them, shall, or may incur, sustain, be at, or be put unto in the execution of the trusts, powers, and authorities committed to them by these presents, such costs, charges, damages, and expenses to be respectively computed, assessed, paid, and made good by the said several parties hereto respectively, and their respective executors and administrators, ratably, according to the amounts of the sums subscribed by them respectively." "That nothing herein contained shall be taken or construed as intending to authorize the said committee of management to do any act whatsoever which the rules of law will not permit."

At a meeting of the company, on the 4th of July, 1845, Mr. Bagshaw and Mr. W. Hughes were appointed trustees of the company. At a meeting of the directors, on the 11th of July, the following minute of proceedings was entered: "The directors, having found it desirable to take offices in the house No. 8 Finsbury Place, south, and the landlords of that house having refused to let it except upon a lease, it was resolved, on the 27th day of June ultimo, that it was expedient that such offices should be taken on a lease for a term of seven, fourteen, or twenty-one years, in the names of W. H. Hughes, Esq., and John Bagshaw, Esq., the trustees of the company; and it is now resolved, that they be requested to execute such lease, and that they shall be, and are, hereby indemnified by the directors and shareholders of this company against any liability that may be incurred by them in respect thereof." In pursuance of this resolution, Mr. Bagshaw executed the lease, dated the 5th of July, 1845, by which the offices in Finsbury Place were demised to Mr. Hughes and Mr. Bagshaw for twenty-one years, determinable at the end of seven or fourteen years, at the rent of 150*l.* per annum. On the 4th of July, 1846, the company was dissolved. Mr. Bagshaw was obliged to pay the rent which accrued after the dissolution, and he made a demand for the repayment of the same, and to be indemnified out of the assets of the company, the same having been ordered to be wound up under the Joint-stock Companies Winding-up Acts. The master, for the purpose of taking the opinion of the court on the point, had made the order which was now appealed from.

Bacon and *Terrell*, for the interim manager, contended that, under provisional registration, it was not competent to take such a lease as this. The Joint-stock Companies Acts, so far from authorizing such a course, discountenanced it. As against his co-directors, Mr. Bagshaw might have a remedy, but as against the contributories represented by the interim manager, he had none; against the contributories generally he had no claim. He was not a creditor of the company. The subscribers' agreement gave no authority to enter into such a contract, and the order must be discharged.

Wigram and *Grove*, for Mr. Bagshaw, observed, that if the company were not liable as a body, at least some classes of the contribu-

In re Cutler's Trust.

tories, as, for instance, the directors of the company, were so, and Mr. Bagshaw ought to be indemnified, as provided by the 83d section of the act of 1848. But under the 23d section of the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, and the subscribers' agreement, the taking of the lease was authorized. It could not be said that the company's act of Parliament would be obtained within the first or second year after their formation, and, therefore, a lease for seven years was not improper; and under the circumstances of difficulty in obtaining, at that time, suitable offices, the directors were justified in the course they had taken. They cited *Garwood v. Ede*, 1 Exch. 264. They admitted that there was a qualification in the subscribers' agreement, by the condition of the act being obtained; still they contended, that, as difficulties might arise in one year which might well be removed the next, it was quite proper to take the offices for the shorter term, and that not being an improvident contract, the master's decision ought not to be disturbed.

Bacon was not called on to reply.

KNIGHT BRUCE, V. C. Not only do I think that a contract of this description was in its nature improper (not using that word offensively) towards the company at large, the directors being aware of the uncertain and provisional position in which they stood, but it seems to me to have been absolutely prohibited by the subscribers' agreement, or the act of Parliament, or both. It is impossible to sustain this as a charge on the whole company. Mr. Wigram has very properly suggested, and it may probably be true, that this burden ought to be borne by the directors, as between themselves. I cannot, however, enter into that question upon the present application. All I have before me is the question, whether the company are liable or not. I do not understand that I am dissenting from the master, for he has not been called on to exercise any judgment upon the question. I only decide that the company at large are not liable. I consider the question between the directors as quite open, and unaffected by my decision.

*In re CUTLER'S TRUST.*¹

August 4 and 6, 1851.

Settlement on Wife.

Although the fund in court belonging to a married woman is less than 200*l.*, she is entitled to have the whole of it settled upon her, the husband being insolvent.

The case of *Foden v. Finney*, 4 Russ. 428, asserting a contrary doctrine, disapproved of.

¹ 15 Jur. 911.

In re Cutler's Trust.

THIS was a petition presented by Joseph Burford, the assignee, under the Insolvent Debtors Act, of Edward Holladay, an insolvent. It stated that John Cutler, by his will, dated the 29th of October, 1829, demised certain freehold messuages, therein mentioned, unto Harry Staples and Thomas Griffin, their heirs and assigns, upon trust to permit his wife Elizabeth to receive the rents for her life, and, after her death, upon trust to sell the same premises, and to stand possessed of the money to arise from the sale, after deducting expenses, and also of all the rest, residue, and remainder of his personal estate and effects, upon trust, as to one equal fifth part thereof, for the said testator's sister Elizabeth, her executors, administrators, and assigns, for her and their absolute use; and he appointed Harry Staples and Thomas Griffin his executors; that the testator died on the 26th of February, 1830, and his will was proved by Thomas Griffin alone; that the testator's widow died on the 22d of November, 1846: that Thomas Griffin had sold the freehold premises; that at the date of the will the testator's sister Elizabeth was the wife of Edward Holladay; that Edward Holladay, on the 13th of September, 1832, presented his petition under the Insolvent Debtors Act, and, under that, the petitioner was the duly appointed assignee of his estate and effects; that on the 16th of May, 1850, Thomas Griffin, as the testator's executor, paid into court, under the Trustee Relief Act, 140*l.*, as the amount of the share of the residue in the said Thomas Griffin's hands of the testator's estate bequeathed by his will to the said Elizabeth Holladay; that no settlement or agreement for a settlement whatsoever had ever been made or executed by the said Edward Holladay and Elizabeth his wife, or either of them, and that, under the circumstances, the petitioner, as such assignee, claimed to be absolutely entitled to the said sum of 140*l.*; and the petition accordingly prayed for the payment thereof to the petitioner.

J. H. Palmer, for the petition, contended that the petitioner, as the assignee of the husband, was entitled to the whole fund, as it was under 200*l.* *Foden v. Finney*, 4 Russ. 428.

Amphlett, for the wife, contended that she was entitled to have the fund settled upon her. *Brett v. Greenwell*, 3 Y. & C. 230.

August 6. SIR JOHN ROMILLY, M. R., said, it always had appeared to him that the distinction taken in the case of *Foden v. Finney* was monstrous. It was a monstrous doctrine, that where the husband deserted his wife, if the fund in court belonging to the wife was above 200*l.*, she was entitled to a settlement; but if it was 199*l.*, the husband was entitled to the whole of it. He had consulted some of the other judges on the point, and was glad to find that his view of the doctrine was taken by others of high authority. He had no hesitation, therefore, in holding that the wife in this case was entitled to a settlement; and he directed the whole 140*l.* to be settled upon her.

Tipping v. Howard.

TIPPING v. HOWARD.¹

March 21, 1851.

"Legal Representatives" — Construction.

The words "legal representatives," used in a deed, cannot be acted upon by the court, unless some context be found in the deed to explain them.

By an indenture of settlement, dated the 12th of February, 1820, in many parts loosely and inartificially worded, the settler covenanted with certain trustees that a sum of 3000*l.* should be paid to them upon trust for investment, and payment of the dividends to Mrs. Howard (then Catherine Winstanley) for her life, for her separate use, and after her death, upon trust for her children; and if she should die without issue, or in case such issue should die under age and without issue, upon trust to pay one third of the dividends and interest to John Howard for his life, if he kept himself a widower; and upon his death, or second marriage, to pay the interest and dividends thereof as follows: One third part to Thomas Winstanley and Ann his wife during their joint and several lives; and after the death of the survivor, to pay the principal, interest, and dividends thereof equally amongst the said Thomas Winstanley's children; and to pay the remaining two thirds of the said 1000*l.* as follows: One third part to "my" cousin Hannah Cotton, or her legal representatives; one third part to "my" cousins Ann Crole and Mary Linister, or their legal representatives, equally; and one third part equally amongst the children of "my" uncle James Lomax, or their legal representatives; and as to the remaining two third parts of the said 3000*l.*, and the interest thereof, after the decease of the said Catherine Winstanley without issue, as aforesaid, to pay one third part of the interest and dividends thereof to the said Thomas Winstanley and Ann his wife during their joint and several lives; and after the death of the survivor, to pay the principal and dividends thereof equally amongst the children of the said Thomas Winstanley, or their legal representatives; and to pay the remaining two third parts of the said 2000*l.*, and the interest and dividends thereof, as follows: One third part to "my" cousin Hannah Cotton, or her legal representatives; one third part to "my" cousins Ann Crole and Mary Linister, or their legal representatives, equally; and one third part equally amongst the children of "my" uncle James Lomax, or their legal representatives. At the date of the deed, all the persons named in it were alive. Mrs. Howard, in the settlement described as Catherine Winstanley, married, and died without issue in 1844. Before the happening of that event, some of the persons named in the settlement died. The suit was instituted for the purpose of having a construction put on the words in the settlement, "legal representatives;" that is, whether they meant executors or administrators, or next of kin.

¹ 15 Jur. 911.

Tipping v. Howard.

J. V. Prior. The words "legal representatives" do not mean executors or administrators, but are substitutional, and mean next of kin, and such next of kin as were living at the death of the tenant for life. As a proof that the words do not mean executors or administrators, it is to be remarked that the latter words are frequently used in the deed, but only then with reference to the trustees. This is sufficient to show that the author of the settlement had in his mind some distinction when he spoke of the successors of the trustees, and the successors of the tenants for life. *Cotton v. Cotton*, 2 Beav. 67. *Bridge v. Abbot*, 2 Bro. C. C. 224. *Long v. Blackall*, 3 Ves. 486. *Walter v. Makin*, 6 Sim. 148. *Booth v. Vicars*, 1 Coll. 6. *Smith v. Palmer*, 7 Hare, 225. *Vaux v. Henderson*, 1 J. & W. 388, note.

Schwyn, for parties taking the same view. The words "equally between them," following the words "legal representatives," show an intention to refer to next of kin rather than to executors or administrators. *Walker v. Lord Camden*, 16 Sim. 329. *Kilner v. Leech*, 10 Beav. 362.

W. M. James. The Statute of Distributions had fixed the meaning of the term "legal representatives" to be next of kin under that statute.

Winstanley, for parties in the same interest.

Osler cited *Wilkinson v. Garrett*, 2 Coll. 643. *Lasbury v. Newport*, 9 Beav. 376. *Urquhart v. Urquhart*, 13 Sim. 627.

Wickens, for the trustees.

Giffard and *S. Scott*, for the executors of some, and administrators of others, of the parties who died in Mrs. Howard's lifetime, were not called on.

KNIGHT BRUCE, V. C. In the first place I will observe, that I consider the present case is not governed by any of the cases cited, and I therefore give no opinion as to any one of them. There are three possible interpretations of these words, either of which leads to the same result. They may mean "executors or administrators," and be, therefore merely what are commonly called words of limitation; or, if words of substitution, they apply to those persons living at the date of the settlement; or they are void for uncertainty; and as each leads to the same result, it is not necessary to say to which I incline. I may add, that the words "legal representatives"—I do not say "legal personal representatives"—is a phrase so loose, and susceptible of so many arguable constructions of a plausible kind, that if a person using those words desires to have them acted upon by a court of justice, he is bound to supply a context to explain them.

Ex parte Hirschel; in re The Brighton, &c., Railway Company.

*Ex parte HIRSCHEL; in re THE BRIGHTON, LEWES, AND TONBRIDGE
WELLS RAILWAY COMPANY.¹*

March 24, 1851.

Joint-stock Companies Winding-up Acts.

The prospectus of a railway company set forth that "Power is hereby given to the provisional committee-men to apply the funds received in payment of expenses of plans," &c. The scheme proved abortive. An allottee of shares was held not to be a contributory."

THIS was an appeal from the decision of Master Sir William Horne, by which he had placed the name of Mr. Daniel Hirschel on the list of contributories of the Brighton, Lewes, and Tonbridge Wells Railway Company in respect of ten shares. In September, 1845, the company was provisionally registered, and in the prospectus issued by the promoters it was stated as follows: "Until an act of Parliament shall be obtained, the affairs of this company will be under the control of the committee of management for the time being, to whom power is given to allot the shares, and to apply the funds of the company in payment of all the expenses incurred in its formation, and in the preparation of the plans and sections to be submitted to Parliament. Power will be applied for in the act, and in the mean time is hereby given to the committee of management as above, to raise any additional capital, to abandon any part of the line, to make branch lines, or enter into any arrangements with any other company or companies, and also to nominate the first directors of the company." Mr. Hirschel applied by letter for shares on the 7th of October, 1845, in the form prescribed in the prospectus. The allotment committee was formed on the 10th of the same month, and on the 17th the ten shares in question were allotted to Mr. Hirschel. He never paid his deposits, but it was admitted in court that he did receive the letter of allotment.

Malins and Southgate, for the motion, stated the ground of the appeal to be, that at the time of the allotment the scheme had been virtually abandoned; and that Lord Cranworth had recently held, that, in such a case, a party was not contributory.

KNIGHT BRUCE, V.C. I should be glad if any one can inform me whether this case is governed by that mysterious one in the House of Lords, which every one who speaks of, or alludes to, professes, whether sincerely or insincerely I cannot say, not to understand. Let the counsel for the official manager distinguish, if they can, the present case from that recently decided by Lord Cranworth.

Bacon and Daniel, for the official manager. The letter of application for shares was founded on the prospectus, and the latter, there-

¹ 15 Jur. 942.

Ex parte Hirschel; in re The Brighton, &c., Railway Company.

fore, formed part of the contract. As by the terms of the prospectus authority was given to incur expenses, this gentleman, by his application, entered into a contract to bear his proportion of such expenses. He is not now at liberty to say that he is not liable. This case is distinguishable from *Capper's Case*, *Maudesly's Case*, and *Carmichael's Case*. In *Capper's Case*, the letter of allotment was conditional; that condition was not agreed to, and there was, therefore, no accepted contract. Here there was an acceptance by the receipt of the letter of allotment, sent in pursuance of the letter of application, and founded on the prospectus. Evidence is here that the applicant saw the prospectus, and he must be assumed to have applied on the footing of that document, which authorizes the incurring the expenses of plans and other matters. With respect to *Maudesly's Case*, there was an order to wind up a formed company. It was a company incorporated, holding the certificate of the Board of Trade, and having a deed of settlement, and Messrs. Maudesly were allottees who did not accept shares. Here, however, there is not a formed company in any sense whatever. It was an abortive scheme, and in all other matters differed from that of *Maudesly*. Nothing further need be said of *Carmichael's Case* than that it was one of a provisional committee-man, and not applicable on the present occasion. *Matthews's Case* governed this, where he was held liable unless there was any fraud. The House of Lords have held, that, if there be no liability at law, the Winding-up Acts have not the effect of creating a liability, and that is the whole extent of the decision. [*Parbery's Case*, 3 De G. & S. 43, and *Woolmer v. Toby*, 4 Railw. Cas. 713, were also referred to.]

Malins was not called on to reply.

KNIGHT BRUCE, V. C. Where courts have been contradicting each other for years, this court can do no otherwise than follow the last decision. As this case, if decided in favor of the official manager, must directly contravene the principle laid down by Lord Cranworth, — a course which I am not in any degree disposed to take, — I shall order the name of the appellant to be removed from the list of contributories. The costs must be paid out of the estate.

Carwardine v. Wishlade.

CARWARDINE v. WISHLADE.¹

May 13, 1851.

*Practice — Claim — Writ of Summons — Service — Stat. 4 & 5
Will. 4, c. 82.*

On a claim for foreclosure, service of the writ of summons on the wife of a party interested in the equity of redemption, who was travelling in America, was ordered to be deemed good service on the husband under the stat. 4 & 5 Will. 4, c. 82, the wife being in the possession and receipt of the rents and profits of the mortgaged property.

THE claim in this case was filed by the mortgagee in fee for foreclosure. The property in mortgage consisted of ten houses. The mortgagor, by his will, devised the property, subject to the mortgage, to his children, in specific shares. One of his daughters, to whom two houses were devised, afterwards married John Connup, who in May, 1850, went to America, where he followed the trade of a butcher. His occupation in that country was to travel for the purpose of slaughtering, and he corresponded with his wife. She was in the occupation of one of the houses devised to her, and received the rent of the other. It was necessary to serve John Connup with the writ of summons.

T. C. Wright now moved that service of the writ of summons upon Mary Connup should be deemed good service upon her husband. Mary Connup, by her affidavit, verified the facts of the case. By the first section of the stat. 4 & 5 Will. 4, c. 82, it is enacted, that the court may order that service of a *subpoena*, to appear and answer, upon the receiver, steward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, be deemed good service upon the party himself. Such being the practice in a suit by bill, it was submitted the same would be followed as to a claim.

KNIGHT BRUCE, V. C., made the order as asked by the motion.

¹ 15 Jur. 913.

In re Butterwick Free School.

In re BUTTERWICK FREE SCHOOL.¹

June 17, 1851.

*Charity — Petition under Sir Samuel Romilly's Act — Motion —
Attorney General.*

By the deed founding a charity it was provided, that when the feoffees of the estates, fourteen in number, should be reduced to four, ten more should be appointed. The number of feoffees having become reduced to three, they presented a petition under the stat. 52 Geo. 3, c. 101, for a reference to the master to appoint new feoffees in trust. The reference being made, pending the proceedings under the order, the schoolmaster died, and it being necessary, pursuant to the foundation deed, that the office should be filled up within a month by the trustees and certain clergymen, notice was forthwith given of an election. A motion was made by one of the three surviving trustees, that the election should be postponed until the whole number of feoffees had been completed; but the court refused to interfere.

By the original deed of endowment of the Butterwick Free School, in the county of Lincoln, dated the 2d of November, 1665, it was provided, that, upon the fourteen feoffees in trust being reduced to four, ten new feoffees should be appointed; and it also provided, that the schoolmaster should be elected and chosen by the feoffees, their heirs and assigns, and the heirs and assigns of the survivor of them, and by the ministers for the time being of the towns of Butterwick, Fish-toft, Skirbeck, Bennington, and Leverton, in the same county, and the major number of them, within one month after the same became vacant. Eleven of the feoffees in trust having died, the three survivors presented a petition under Sir Samuel Romilly's Act, 52 Geo. 3, c. 101, praying the appointment of eleven more; and by an order made on that petition, dated the 13th of January, 1851, a reference was made to the master to inquire and state whether the petitioners were the sole surviving feoffees in trust of the charity estate; and if he should find that they were, then it was ordered that the master should approve of eleven fit and proper persons to be appointed feoffees in the place and stead of the feoffees in trust who had died; and after the master should have made his report, such further order should be made as should be just. Before the master made his report, the Rev. Mr. Wilson Banks, the master of the school, died on the 24th of May, 1851, whereupon two of the surviving feoffees in trust, and the ministers of the five towns named in the endowment deed, issued a notice of their intention to proceed to elect a new schoolmaster in the room of Mr. Banks on the 19th of June. The other feoffee now moved, under the jurisdiction given by the act under which the original petition was presented, that the election of schoolmaster might be stayed until after the new feoffees in trust of the school should be appointed, under the order of the 13th of January last.

Russell and J. H. Palmer, for the motion, contended that powers

¹ 15 Jur. 913.

In re Butterwick Free School.

vested in trustees should not be exercised *pendente lite*. *Webb v. Lord Shaftesbury*, 7 Ves. 480. *The Attorney General v. Clack*, 1 Beav. 467. *Foley v. Wontner*, 2 J. & W. 246. The provisions in the deed prevented any valid election of a schoolmaster being made while there were but three feoffees. They also referred to the case of *Re Chipping Sodbury School*, 5 Sim. 410, for the purpose of showing that the proper mode of applying in this case was by motion.

Malins and *Rusk*, for the two other feoffees, objected to the postponement of the election. The deed required that the master should be elected within a month after the vacancy occurred, and there was now a sufficient electing body. The present motion was made by one person only, which was not sufficient under Sir Samuel Romilly's Act, for that act required two or more persons to be applicants.

KNIGHT BRUCE, V. C. When the jurisdiction has once fastened under Sir Samuel Romilly's Act, an application may be made by motion. It is, however, a question whether, in such a case as this, the present application is a proper one.

Russell was heard in reply.

KNIGHT BRUCE, V. C. Does the attorney general appear? Did he appear before the master?

[*Russell*. No.]

My impression is, that the attorney general ought to have been, or to be, before the master.¹ However that may be, I have serious doubts whether I can entertain the present application without having the attorney general before the court. It is true, that when once the jurisdiction has fastened (to use the expression ordinarily adopted) under Sir Samuel Romilly's Act, proceedings may be by motion, but the motion must be within the influence and sphere of the matter producing the original petition. I have some doubts whether, considering the very limited nature of the order and of the original petition, the proposed step is not too large for the court to take. But that is not all. The existing feoffees and the five clergymen have, or have not, the power by law of electing a master, *rebus sic stantibus*. If they have, I do not consider that sufficient ground has been laid before me for interfering. If they have not, then the election will be ineffectual; and it may in that case, on a proper proceeding for the purpose, be set aside. It appears to me that the balance of expediency is much in favor of the court not acting on the present application; but I abstain from expressing an opinion whether an election can, or cannot, be made by the present trustees. I make no order on the motion.

¹ On this, see the case of *The Attorney General v. The Earl of Stamford*, 1 Ph. 737.

Beman v. Rufford.

BEMAN v. RUFFORD.¹

May 11, 12, 27, and 29, 1851.

Railway Company — Injunction.

Where a railway company is authorized by act of Parliament to construct a railway on the broad gauge, they are not prevented from laying down rails on the narrow gauge also.

A railway company is not authorized to give up the management of its line to another company.

Where the directors of a company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from laying down the rails till the validity of the contract had been decided upon at law.

THE bill in this case was filed by some of the shareholders of the Oxford, Worcester, and Wolverhampton Railway Company, on behalf of the others, against the directors of that company and against the company, and against the London and North-western Railway Company and the Midland Railway Company, praying that those defendants might be restrained from carrying into effect a certain agreement for laying down narrow gauge rails on the railway.

Bethell, R. Palmer, G. L. Russell, and Freeling, for the plaintiffs.

The *Solicitor General* and *Follett*, for the London and North-western Railway Company.

Malins and Jessel, for the directors of the Oxford, Worcester, and Wolverhampton Railway Company.

J. Parker, Rolt, Willcock, and Speed, for other parties.

The facts of the case are sufficiently stated, and the principal arguments are alluded to, in the judgment.

On behalf of the plaintiffs, and the Great Western Railway Company, it was argued, that the Oxford, Worcester, and Wolverhampton Railway was indissolubly connected with the Great Western Railway Company, it being to be made on the broad gauge, and to the satisfaction of the Great Western Railway Company's engineers, and they having a right to name six directors and to lend money. It was also contended that there was a previous agreement with the Great Western, and that the agreement with the London and North-western was illegal.

On the part of the London and North-western Railway Company it was argued, that the granting the injunction would ruin the company, as the company had no means of procuring money to finish the railway, except from the London and North-western. The illegality of the contract with the London and North-western was cer-

¹ 15 Jur. 914.

Beman v. Rufford.

tainly not so clear as to authorize the court at once to interfere. The agreement had been sanctioned by a majority of the shareholders, and the court would not interfere. *Foss v. Harbottle*, 2 Hare, 461. *Mozley v. Alston*, 1 Ph. 790; 11 Jur. 315. *Lord v. The Copper Miners Company*, 2 Ph. 740; 12 Jur. 1059.

The following cases were cited by the plaintiffs in support of their right to file such a bill: *Bagshawe v. The Eastern Union Railway Company*, 6 Railw. Cas. 152; 14 Jur. 491; *Ward v. The Society of Attorneys*, 1 Coll. 370; *Collinson v. The Eastern Counties Railway Company*, 4 Railw. Cas. 513; and *Carlisle v. The South-eastern Railway Company*, 1 Mac. & G. 689; 14 Jur. 535.

LORD CRANWORTH, V. C. I think the parties are entitled to have my view of the whole of this case, to see the result at which I have arrived, though I do not know that my view will exactly satisfy any of the parties. The bill is filed by one of the shareholders of this unfortunate Oxford, Worcester, and Wolverhampton Railway Company, or, rather, by several on behalf of themselves and of all the others, and the object of the bill is to prevent their company from misapplying the funds of the company — from applying them in the mode in which by act of Parliament they are not authorized to apply them; and for that purpose, these shareholders are clearly entitled to file this bill. No doubt the parties who are materially interested in the question are the Great Western Railway Company — there is no disguising that; nor, as far as I can see, is there any reason or any wish to disguise it. The bill, however, is filed by the shareholders, and it must be on the principle of a shareholders' bill that I must decide it. Now, the principle on which these shareholders filed this bill is this: that they are entitled to file it on behalf of themselves and all the others, because the court will not tolerate any person saying, that all are not interested in having the law of their company carried into effect. I will not allow any speculations that it would be more advantageous to do something which the act of Parliament does not authorize to be done; therefore it is that in this, as in many other cases, one shareholder may file a bill on behalf of himself and others, although at a meeting of the company a great many of the shareholders — the majority, in fact — may say that they have sanctioned a different course of proceeding. These shareholders so filing this bill say this: "Our company, the Oxford, Worcester, and Wolverhampton Company, together with the directors, have entered into a contract with the North-western and Midland Companies different from that which was contemplated by the act of Parliament, and propose to apply our funds in a mode in which we never authorized that they should be applied;" therefore, it seeks to restrain them; and the case was rested on three main grounds. First of all, it was said, that, by the act of Parliament which incorporated this Oxford, Worcester, and Wolverhampton Company, there was a sort of union constituted between them and the Great Western Company, which rendered it impossible for the Oxford, Worcester, and Wolverhampton Company afterwards to unite them-

Beman v. Rufford.

selves in interest with the London and North-western Company, or the Midland Company, to the prejudice of the Great Western Company. Secondly, it was said, that if that be not a correct view of the case, still there were contracts between them which prevented them, independently of the act of Parliament, or if not independently, from contracting together at all. And, thirdly, the contract itself, which has been entered into between the Oxford, Worcester, and Wolverhampton Company, and the London, and North-western, and Midland Companies, is a contract which, irrespective of any engagement of the Oxford, Worcester, and Wolverhampton Company with the Great Western Company, is of itself an illegal contract, and, therefore, ought not to be carried into effect. And if that be the correct view of the law, I am clearly of opinion, on all the authorities, and all principle, that it is the province of this court to prevent such an illegal contract from being carried into effect, because, on the principle that has been so often laid down, this court will not tolerate, that parties having the enormous powers which those railway companies have obtained, shall lay out one farthing of the funds out of the way in which it was provided by the legislature that they should be applied.

Now, as I have already said, in my opinion the contract which has been entered into between the Oxford, Worcester, and Wolverhampton Railway Company, and the North-western Railway Company, and the Midland Company, is a contract which is illegal; that is my opinion, and, I confess, my strong opinion; but at the same time it is undoubtedly purely a legal question, and, therefore it is that I must direct a case to be stated for the opinion of a court of law, in a form that may be easily considered afterwards, as to whether my view is right or wrong. Then the question arises, when that case is stated, What is to be done in the mean time? Why, that I take to be purely a question for the discretion of the court. The present lord chancellor states that very distinctly in the case to which I was referred, — *The Shrewsbury and Birmingham Railway Company v. The London and North-western Railway Company*, 14 Jur. 1125, — and which was before him; his lordship would not grant an injunction, because, he said, "What you are seeking to restrain here is this: you, the plaintiffs, the Shrewsbury and Birmingham Company, say, that a contract which has been entered into between yourselves and the North-western Company is an illegal contract. By that contract, the North-western Company bind themselves not to take certain passengers; in defiance of which, they choose to take them." Lord Cottenham had decided that that was a legal contract, or that, at all events, the bill was not demurrable. The bill had reference to that contract, and a motion was made by the Shrewsbury Company against the North-western Company to restrain them, in violation of that agreement, from carrying passengers to a particular place. The lord chancellor, evidently, I think, doubting whether Lord Cottenham had not been hasty in his view, directed a case for the opinion of a court of law, and then said, and I think most wisely, "I will not restrain them in the mean time; I must exercise all

Beman v. Rufford.

discretion ; I shall direct them to keep an account of all profits made by carrying passengers over the line in question, or a portion of the line in question ; and if it turns out eventually that they have no right to carry such passengers, then I shall only have to direct them to account to you for what they have made ; and complete justice will be done. Probably that will be more profitable to you than the injunction, and there will be no injury done to any one."

That is not the case here, because this agreement involves this ; the plaintiffs will say that "our money is to be laid out in constructing a railway, which we say you have no right to construct." At all events, therefore, if that be so, irreparable injury happens to the plaintiff here, and the money is gone, and gone to an insolvent person, and it is not to be got back by tearing up the rails and selling them ; it is impossible that such a course could be pursued. Therefore, here, I think, if I am right in saying that the agreement is illegal, or that it has such an appearance of illegality that I must direct a case for the opinion of a court of law, I must couple that with an interim injunction, restraining the expenditure of the money in the mean time in the prohibited mode. That is the course which I propose to take ; and that being so, I will now state why it is that I think this agreement is illegal. The agreement is an agreement by the Oxford, Worcester, and Wolverhampton Company, who had obtained their act in 1845, had proceeded to a certain extent in making their railway, and had become bankrupt, so to say ; that is, they had made a great many works, and for want of money they were unable to get on, or to raise money, and were endeavoring in all sorts of ways to get persons to keep them out of their difficulties ; first of all, with the Great Western and other companies, and they finally entered into this agreement with the North-western Company ; when I say the North-western Company, it is, in fact, the North-western and the Midland Companies united. The Oxford, Worcester, and Wolverhampton Railway was to be completed as a narrow gauge, double line, except as follows : that is, a part of the line was to be single, ready for efficient working, in all respects, from the Buckingham line at Oxford.

Now, the first question that arises on that is on the construction of the act of Parliament. Have the Oxford, Worcester, and Wolverhampton Company a right, or have they not, to make the narrow gauge line throughout ? In my opinion, although I am granting the injunction, I think they have ; and if there were to be a meeting of this company, this Oxford, Worcester, and Wolverhampton Company, deliberating on what was the best for themselves to do with regard to the gauge, I think all that they are bound to do, in conformity with the act of Parliament, is to make such a gauge as shall enable the line to be traversed continuously by the Great Western, and also to make such a line as shall enable it to be traversed continuously from Wolverhampton to Abbotswood by the Midland and North-western Companies — that is to say, to make a broad gauge throughout the whole line, and a mixed gauge or a narrow gauge besides during that portion which is in the north from Abbotswood to Wolverhampton.

Beman v. Rufford.

Then it may be said, if that is my opinion that they had a right to make such a line, why am I to restrain them now? Because, although I think, as an abstract proposition, if the company meet and say, "That is the best for our interest," they may make it, yet when the company meet and say, "We will make that line in consideration of the North-western and Midland Companies doing such and such acts," which, in my opinion, are quite illegal, then I do not know what arrangement the Oxford, Worcester, and Wolverhampton Company would have made, if it had not been that they are making it in consideration of that which, in my opinion, never could be performed for them. That is the reason why I do not feel that the question, of whether they may make a double continued line of narrow gauge, really arises in this case; for whether they can make it or not, though it is my opinion they can make it, I am clear, on the construction of the agreement, that they cannot make it pursuant to this agreement. Now, the reason of that is what follows. Having stipulated to make a double line narrow gauge in all respects, except in a particular place, where it is only to be single, for a certain time, they go on to say this: "The whole concern, without incumbrance, when completed, to be worked by the London and North-western and Midland Companies, who shall have perfect control, and exercise all the rights of the Oxford, Worcester, and Wolverhampton Company, and who shall find stock and work the concern for twenty-one years, on the following terms: The gross receipts from all sources to be carried to a common fund, out of which the following are to be paid, in the order stated: First, 53,000*l.* per annum, or it may be, eventually, 60,000*l.*, to the Oxford, Worcester, and Wolverhampton Company, to provide for debentures and preference shares, or such less or greater sum, not exceeding 60,000*l.*," and so on, up to 150,000*l.*, and then in moieties afterwards.

Now, in my opinion, it is neither more nor less than a contract on the part of the Oxford, Worcester, and Wolverhampton Company, that, when the line is completed, they will hand it over to be worked by the London and North-western Company and the Midland Company. I put the question several times to the various gentlemen who appeared in the different interests, and I do not think any of them construed this quite in the same way. But in my opinion it is just the same thing, practically, as if they had leased the line to them, because what they say is, not that the Midland and the North-western Companies are to run their trains upon the lines, but what they are to do is this: "The whole concern, without incumbrances, when completed, to be worked by the London and North-western and Midland Companies, who shall have perfect control, and exercise all the rights of the Oxford, Worcester, and Wolverhampton Company."

Now, as this will be stated as a case for the opinion of a court of law, I need not go further into it than to say, in my opinion, that is delegating the functions, which the legislature has given them, to other parties, which they have no possible right to do. For the security of the public, there are a vast quantity of duties imposed on the company which is incorporated; they are bound to have station

Beman v. Rufford.

masters and policemen, and to have proper people to attend to the signals, and a variety of matters in which the public are concerned; and although it is said there is nothing here which prevents the construction that they are still to retain and do all these things themselves, merely meaning that the North-western and the Midland Companies are to run their carriages on it, I must say I think it is idle to suppose that such was the meaning of the contract; for if that were so, they are left to pay all the expenses, without the possibility of getting a single farthing to work the line with, for the whole receipts are to be divided in the mode pointed out. This, in my opinion, is clearly a delegation. I do not go into the clauses. I have looked at several of the clauses which follow the 87th, from which it appears clearly that the incorporated company are to be the parties to do a variety of matters under certain circumstances, and they cannot delegate that right to other parties. Besides which, a variety of other things are to be done by them which they have now agreed shall be done, not by themselves, but by the North-western and Midland Companies. Therefore, in my opinion, this is an illegal agreement. I do not think it is at all varied by the circumstance, that when the Oxford, Worcester, and Wolverhampton Company finally put their seal to it, they put this appended: "That this company retain power to insure full development of the traffic of the line in a manner satisfactory to the board." I really do not understand what that means, after they have delegated to the others the full right of working it, with all the powers they had themselves. It would be difficult, under any definition of the term "development," to say that they could exercise and fulfil their powers, and perform all their engagements. If they found, as they might, that the North-western Company or the Midland Company were, as they supposed, playing them false, and not sending a due proportion of the traffic that was coming beyond Wolverhampton up to London through the Oxford, Worcester, and Wolverhampton line, but taking more than a fair share over the old Birmingham line, then they might call them to account for so doing. That, I think, is the meaning of it: it clearly cannot annul—for that was the agreement—all that went before. If that was so, it neutralizes the whole, and makes the agreement a nullity, which is a construction that it is impossible to put upon it. Therefore, for these reasons, which I have stated shortly, I think that the agreement is void; and, consequently, that the whole of it is void, and that I ought to restrain the parties from carrying it into execution; but I only restrain them from carrying into execution that portion of it which we call, for want of a better expression, irreparable injury; that is, the expenditure of money, which it will be impossible, perhaps, ever to get back again.

Now, that is the view I take of the case; and having said that, it would not be strictly necessary for me to say any more. My view is, that it would have been competent for the company to have sanctioned a double or single narrow gauge line throughout, but that it is not competent for them to enter into this argument, which is itself altogether void. With regard to the other part of the argument, that

Beman v. Rufford.

the company is bound to the Great Western Company, I confess I have not felt at all satisfied about that. As I am of opinion that, on the grounds I have mentioned, I ought to restrain it, it is not strictly necessary for me to decide that matter; but I think that the answer which has been given to that is, to my mind, satisfactory. No doubt, great powers have been given to the Great Western Company with reference to this company, but they are powers all defined: they are to have the right of taking a very great quantity, about 750,000*l.* worth of shares; they are to have — whether they take the shares or not, as I read the act — six of their own directors as directors of this body; they are empowered to take a lease, their engineer is to be satisfied with the gauge, and the gauge is to be such as can be continuously worked by their engineers. I think there are one or two other provisions, but they are all defined. I do not think that prevents the Oxford, Worcester, and Wolverhampton Company from doing any thing that may be thought by the Great Western Company prejudicial to them, if it is not necessarily in contravention of the particular clauses. Now, with regard to the agreement, I do not think there is any binding agreement. Perhaps at one time there was a binding agreement — namely, that agreement of the 24th of September, 1844, before the act passed. That was an agreement, whereby the Great Western Company stipulated that they would pay 32,000*l.* to this company when the railway should be formed, taking a lease for 999 years for it. Perhaps that was a binding agreement; but I think, after the company was formed, and when it was found that a vast deal more than a million and a half was necessary, that the true result of what passed was, that by common consent that was abandoned as being an impossible agreement; they could not complete the line for a million and a half, and it fell to the ground. Then they proposed a great extension of capital, and the Great Western Company have, perhaps, (I give no opinion about that,) bound themselves, if it had been closed with, to increase the sum to the guaranty, at 4*l.* per cent. on two millions and a half. That may be so, but it was not accepted, and there must be two parties to a bargain; they do not agree to that; they understood that what the Great Western Company agreed to do was to guaranty whatever sum they expended. Now, I do not think the Great Western Company ever did guaranty that, or ever intended to guaranty that; at all events, neither party understood it, and they went on to expend the money in a reckless way. I cannot exculpate or exonerate the Oxford, Worcester, and Wolverhampton Company from a great deal of blame, for there are two or three occasions in which they say it would be better for us not to have this credit; but I think that was a very unwise thing; at all events, the Great Western Company clearly had at one time said, "We will not guaranty you indefinitely;" at least, Mr. Russell had written to their directors to that effect: "We will guaranty to the extent of two millions and a half." The Great Western shareholders had authorized their directors to guaranty to any extent they thought fit; and the Oxford, Worcester, and Wolverhampton Company, having ascertained this, thought that throughout they might rely on

Humphrey v. Humphrey.

the directors for guarantying them beyond two millions and a half, but they never bound themselves to do so; and whether it was from any other objections that arose in the mean time with regard to the other rival railway, or from whatever other cause, is not material to inquire into; there was never any agreement entered into. Therefore, on that ground, I think that part of the agreement would entirely fail. But, as I have already stated, that which was the third branch of the argument relied on by counsel seems to me to be all-sufficient to warrant me in granting the injunction in that form; and, therefore, the injunction which I shall grant will be an injunction directing a case to be sent for the opinion of a court of law, and in the mean time restraining the Oxford, Worcester, and Wolverhampton Company from carrying into effect so much of the agreement of the 21st of February, 1851, as binds them to lay down rails on any part of the line on the narrow gauge. It is suggested that there may be preparations made for it; but that can hardly be so, and it is a very unlikely thing. I think that will meet all the merits of the case.

Injunction from doing any act or acts for carrying into effect so much of the agreement as relates to the laying down the rails on any part of the line on the narrow gauge, so nevertheless as not to restrain them from following the 44th section of the Narrow Gauge Act.

HUMPHREY v. HUMPHREY.¹

March 21 and 22, 1851.

Legacy — Bequest of Interest.

A testator bequeathed to his wife the interest of the capital sum of 1000*l.* for her sole use and benefit, independent of any husband she might marry, and her receipt alone to be a sufficient discharge to his executors. He also gave his china, plate, &c., to his wife absolutely, and the residue equally between his two brothers:—

Held, that the gift of the interest of 1000*l.* was tantamount to an absolute bequest of the capital.

THE bill stated that Samuel Humphrey, by his will, dated the 23d of August, 1844, after directing various legacies to be paid out of his estate, directed the partnership business, which he was carrying on jointly with other persons, to be continued for a limited time, according to the provisions of the deed of partnership. The testator then continued, "As to the produce of my share and interest in the said copartnership business, when the same shall be finally adjusted and disposed of, I direct that the produce thereof, and I give and bequeath the same unto my wife, Sarah Ann Humphrey; and I also give and bequeath to my said wife the interest of the capital sum of 1000*l.*, for her sole use and benefit, and free from the debts and control of

¹ 20 Law J. Rep. (N. S.) Chanc. 425.
10*

Humphrey v. Humphrey.

any husband she may marry, and her receipt alone shall be a sufficient discharge to my executors." The testator then gave his furniture, plate, china, &c., to his wife absolutely, and the residue of his personal estate and effects, subject to the payment of his debts, unto his brothers Charles and John Humphrey, equally between them, and he appointed his brothers John and Benjamin Humphrey executors of his will.

The bill, which was filed by the person entitled to the residuary estate of the testator, then stated that Sarah Ann Humphrey, the wife of the testator, had, since his death, intermarried with Joseph Billings. It charged, that, upon a true construction of the will, the said Sarah Ann Billings, the testator's widow, was entitled to receive the interest only of the said capital sum of 1000*l.* during her life, and that the same capital, subject to such life interest, constituted part of the residuary personal estate of the said testator; and it prayed that the defendant, the surviving executor of the testator, might be restrained from paying the said capital sum of 1000*l.* over to the said Joseph Billings and Sarah Ann his wife, or either of them.

Mr. Malins and *Mr. Swinburne*, on behalf of the plaintiffs, contended as follows: It was true that it had for some years been adopted as a rule that an unlimited bequest of the interest or annual produce of personal estate carried the principal, unless indications of a contrary intention could be discovered in the will. Such indications might be drawn from any matter capable of affording an inference of intention not to give the principal, however extraneous to the particular bequest itself, from other dispositions in the will, quite foreign to it, and from the general character and effect of the whole will. *Rawlings v. Jennings*, 13 Ves. 39. *Clough v. Wynne*, 2 Madd. 188. These cases showed the general nature of the circumstances from which the inference of intention might be drawn, and that any matter capable of suggesting an inference of intention not to give the principal might be resorted to. Many such matters presented themselves in this will.

First, it appeared from the will itself that the testator was a merchant, carrying on business in the city — that, therefore, he necessarily knew the difference between interest and capital; secondly, the testator first made an absolute bequest to his wife of the produce or money produced by realization of his partnership property; he then, by another dispositive clause, gave her the interest of the capital sum of 1000*l.*, and immediately afterwards he proceeded to give her his furniture, &c.; and this he not only gave by a fresh dispositive clause, but he emphatically declared that he gave it absolutely, just as a man who by the immediately preceding bequest had given only a partial interest naturally would do; thirdly, inasmuch as the testator must be taken to have known that the bequest, if of principal, would be payable at the end of one year from his own death, the disposition to her separate use showed that he must have contemplated his wife marrying again before the expiration of a year from his death, which seemed hardly reasonable to suppose. The more

Humphrey v. Humphrey.

natural interpretation was, that the separate use was intended by the testator to extend to the whole life of the wife, and to guard against marriage at any time; fourthly, the testator proceeded to give two legacies of 500*l.* and 200*l.*, and then he did not give those sums as the interest of the capital sums of 500*l.* and 200*l.*, nor as capital sums of 500*l.* and 200*l.*, but simply as sums of 500*l.* and 200*l.*, from which clearly arose an inference that by the gift of the interest of the capital sum of 1000*l.* the testator must have meant something different from the gift of 1000*l.* Such were the evidences furnished by the will itself, that it was not the intention of the testator to give the principal sum of 1000*l.*

Next, as regarded the rule itself. Although judges had frequently recognized it, and counsel extensively acted upon it during the last twenty-five years, its validity and legal truth were more than questionable. It was a rule which led not only to the disappointment of the testator's intention, but to the corruption of the law, and it would be proper to see when such a rule first arose how it arose, and what were its consequences. The first case referred to by the text books on this subject was *Elton v. Sheppard*, 1 Bro. C. C. 532, which came before the court in 1781. There a testatrix bequeathed 2000*l.* in trust, to pay the produce to her daughter for her separate use, and Sir T. Sewell decided that the words "in trust, to pay the interest to her daughter for her separate use," being unaccompanied by words limiting the duration of the trust, gave her an absolute interest. The next case was *Philipps v. Chamberlaine*, 4 Ves. 51, which came before Lord Alvanley in 1798. In that case, the residue of real and personal estate was given to trustees in trust, to convert into money and invest in government or real securities, and the testator gave the interest and dividends of this residue (or a part of it) to the trustees and their heirs, upon trust, to pay the interest and dividends to A. Lord Alvanley thought that the gift of the interest and dividends to the trustees and their heirs was a gift to them forever, and that the trust to pay the interest and dividends to A., without limitation of duration, would carry the whole interest. The cases showed very clearly that neither Sir T. Sewell nor Lord Alvanley had any knowledge of any such rule as that an unlimited gift of the interest of personalty passed the principal. The next case, *Rawlings v. Jennings*, 13 Ves. 39, occurred in 1806. A testator bequeathed in these terms: "To my wife, 200*l.* per year, being part of the moneys I now have in bank security, entirely for her own use and disposal, with all my household furniture." The testator gave life interests expressly to other legatees. Sir W. Grant said, that the words "for her own use and benefit" were very material, that when the testator meant to give a life interest only he had done so in the plainest terms, using the words "during her natural life." This difference of disposition was a circumstance whence a difference of intention might be collected. Besides, the wife was to take absolutely the furniture and effects which were coupled with that and given by the same clause; all this was in favor of the widow, who was, therefore, entitled to so much capital stock as would produce 200*l.* a year. In *Page v. Leap-*

Humphrey v. Humphrey.

ingwell, 18 Ves. 463, which was decided in 1812, a testator gave the overplus of his estate to trustees upon trust, to lay out in the public funds, and pay the interest and dividends to his wife and another, as tenants in common; and Sir W. Grant said that an indefinite gift of the dividends gave the absolute property of stock. In *Stretch v. Watkins*, 1 Madd. 253, a testator bequeathed to his daughter 120*l.* per annum, that was to say, the interest of 4000*l.* of his 3*l.* per cent. stock; and Sir T. Plumer decided that the daughter was entitled to the 4000*l.* stock, using these words: "If the produce of stock be given without limitation, it carries the principal. I have a strong recollection of cases to that effect;" and on a subsequent day, his honor said, "The cases I alluded to as having determined that an unlimited bequest of the interest of stock passes the principal are *Philipps v. Chamberlaine* and *Elton v. Sheppard*. It was apparent from the three last-mentioned cases that no such general proposition as that an indefinite gift of the income of personal estate carried the principal had entered the mind of Sir W. Grant in the year 1812, nor that of Sir T. Plumer up to the year 1815. It so happened, however, that each of these judges was called upon, shortly after making these enunciations with respect to gifts of dividends of stock, to adjudicate on a case which involved a gift of the interest or income of other personal estate. In *Adamson v. Armitage*, 19 Ves. 416, the bequest was, "To Lydia Adamson the balance of my account in Mr. Downing's hands, to be vested by my executors in the hands of trustees whom they should choose, the income therefrom to be for her sole use and benefit." Sir W. Grant said the proposition stated in *Elton v. Sheppard* was conformable to the rule of law, and to what was laid down by Lord Alvanley in *Philipps v. Chamberlaine*; but it was not necessary, in order to entitle the plaintiff to a decree, as there was an express bequest in the first part of the codicil of the entire fund; and admitting a gift of the produce of a fund, as a fund merely to create a life interest, it did not follow that, where there was in the first instance a gift of the fund itself, the subsequent direction would reduce it to a life interest merely. In *Clough v. Wynne*, a testator, after bequeathing 2000*l.* to his brother, gave the interest of the remainder to his mother for life, and after her decease to Catharine Clough, who claimed the residue absolutely. Sir T. Plumer said, that giving the interest of personalty without limitation would pass the whole interest, unless there were words to confine it to a life interest. The testator knew how to give a life interest if he meant to do so. The defendant's construction would have the effect of making the testator die intestate as to part of his property. In the case of *Adamson v. Armitage*, Sir W. Grant expressed his opinion that an unlimited gift of the interest of personal estate was a gift of the principal; and Sir T. Plumer advanced the same proposition on the authority of the above cases, with respect to personal estate in general. It was remarkable that neither of these judges acted judicially on this opinion, but each carefully based his decision on the intention of the testator *dehors* the bequest itself.

This state of things remained till the year 1824, when the case of

Humphrey v. Humphrey.

Haig v. Swiney, 1 Sim. & S. 487, came before Sir J. Leach. In that case, a sum of 9000*l.* stock was given by a testator to trustees to pay the dividends to a married woman for her separate use. Sir J. Leach said, a general gift of the income of personal property was equivalent to a general gift of the property itself; and it made no difference whether the income were given to the legatee directly, or through the intervention of trustees. Since that decision the rule had been regularly acted upon, and judges had repeatedly recognized it, although it had never been established by any direct decision. The rule arose in this manner: Sir W. Grant and Sir T. Plumer started the doctrine, manifestly confining it at first to gifts of the dividends of stock, and both of them afterwards advanced a step further, and stated the doctrine as applicable to gifts of the income of personal estate generally, not, however, deciding any case upon that doctrine. Sir J. Leach took a bolder step, and acted upon the rule in all its breadth, rejecting all other grounds furnished by the case before him. The reason of the rule having been so established was the hasty and imperfect view which had been taken of the authorities of *Elton v. Sheppard* and *Philipps v. Chamberlaine*, so that the important principle governing those and other similar cases had become entirely lost. This principle, after lying hid for the lapse of a century, was brought to light again in the case of *Moore v. Cleghorn*, 10 Beav. 423; s.c. 16 Law J. Rep. (N. S.) Chanc. 469; 17 Law J. Rep. (N. S.) Chanc. 400, in which Lord Cottenham held, that where real estate was devised to trustees, in trust for A. B., without any limitation of the estate to the *cestui que trust*, the latter, nevertheless, took the beneficial interest in fee; still it was impossible to read the judgments in the cases of *Elton v. Sheppard* and *Philipps v. Chamberlaine* without seeing that those cases were decided on the ground that the property was given *absolutely* to the trustees. This was proved by a line of prior cases; the first of which was *Newland v. Sheppard*, 2 P. Wms. 194; then followed *Peat v. Powell*, Amb. 387; s. c. 1 Eden, 479; after that came *Hale v. Beck*, 2 Eden, 229; and *Atkinson v. Paice*, 1 Bro. C. C. 91. This review of the cases decided by Lord Mansfield, Lord Keeper Henley, Lord Northington, and Lord Thurlow put it beyond doubt that Sir W. Grant was mistaken in supposing that Sir T. Sewell ever stated any proposition in *Elton v. Sheppard*, or that Lord Alvanley, in *Philipps v. Chamberlaine*, ever laid down any thing to the effect that a bequest of the income of personal estate would convey the principal. And it also showed that Sir T. Plumer was equally mistaken in supposing that those two cases were authorities that a gift of the interest of stock passed the principal. The same cases must forcibly suggest how unfounded was that general principle on which Sir J. Leach professed to decide *Haig v. Swiney*, and how unfounded was the *dictum* of the same judge, when he said that it made no difference whether the income were given to the legatee directly, or through the intervention of trustees.

The next question was, What were the consequences of the rule? The late vice chancellor of England, assuming the truth of this rule,

Humphrey v. Humphrey.

had held upon two occasions that a bequest of an annuity amounted to a bequest not for life, but in perpetuity, or to a bequest of such a sum of money as would purchase a perpetual annuity. *Tweeddale v. Tweeddale*, 10 Sim. 453; s. c. 9 Law J. Rep. (N. S.) Chanc. 147. *Blewitt v. Roberts*, 10 Sim. 493; s. c. 9 Law J. Rep. (N. S.) Chanc. 209. These decisions were, however, reversed by Lord Cottenham in *Blewitt v. Roberts*, Cr. & Ph. 274; s. c. 10 Law J. Rep. (N. S.) Chanc. 343. Lord Cottenham, however, reversed the decisions without affecting the rule in question; and to admit the truth of the rule, and yet to hold that a general bequest of an annuity would pass a life interest only, would lead to endless difficulties. Under these circumstances, it was contended that this rule arose from mistake and misapprehension of the authorities; that it was opposed to common sense and the ordinary impressions of mankind. It tended to disappoint the intention of testators, and to the derangement of the system of courts of equity; that the court ought, therefore, by its decision in this case, to show that such a rule would not be any longer sanctioned.

Mr. Stuart appeared for the executor, Benjamin Humphrey.

Mr. Bethell and *Mr. Cole*, for the testator's widow.

LORD CRANWORTH. In this case, which was argued yesterday, I am of opinion that there is an absolute interest in the capital sum of 1000*l.*, which was given by the will. In many of the cases cited, one may suppose that they went upon what was the intention of the testator; but it has been decided in many cases, over and over again, that if you give the interest of a fund you give the interest forever, and that this will pass the capital. Here the words are, "I also give and bequeath to my wife the interest of the capital sum of 1000*l.* for her sole use and benefit, and free from the debts and control of any husband she may marry, and her receipt alone shall be a sufficient discharge to my executors." I may observe that the word "receipt," being in the singular number, rather looks as if she might give one receipt for the whole sum. The only argument opposed to this construction is, the use of the word "absolutely" in the subsequent gift of china, &c. It is important here to have an intelligent line drawn, and it would be ridiculous to give the prior bequest a different meaning, merely because the word "absolutely" is used in a subsequent gift of china.

Gardner v. Perry.

GARDNER v. PERRY.¹

June 12 and 17, 1851.

Settlement — Portions — Interest.

A. by a deed, dated in 1826, settled property on himself, for life, with remainder for such of his children as he should by deed or will appoint, with remainder, in default of appointment, to all of his children equally. The deed contained a power enabling A. to give a jointure to any wife whom he might afterwards marry, and a direction that, unless the contrary should be directed by any appointment, it should be lawful for the trustees to apply the income of the share of any child for his maintenance. A. married soon after the date of this deed, and his wife died in 1836, and there were two children of this marriage. In 1836, A. married B., and, by a deed dated in that year, he gave a jointure to B., and directed that, if there should be two children of the marriage, the trustees should raise 4000*l.* for the portions of such children, to be paid to them at their ages of twenty-one years, after the death of the survivor of A. and B., with power for the trustees to give interest on the portions between the death of the survivor of A. and B. and the time of payment. A. afterwards appointed portions for the children of the first marriage, with interest from his death. There were two children of the second marriage. A. died in 1849:—

Held, that the children of the second marriage were not entitled to interest on their portions between the death of A. and the death of his widow.

By indentures, dated the 10th and 11th of July, 1826, Thomas Ashmead Perry conveyed and assigned certain real estates and personal property therein mentioned to trustees, upon trust for T. A. Perry for life, and, after his decease, upon trust "for the children, grandchildren, or other issue of the said T. A. Perry, in such manner and form, and, if more than one, in such parts, shares, and proportions, and for such estate or estates, interest or interests, and, either by way of annuity, sum in gross, or otherwise, and with such directions for maintenance, education, and advancement in favor of all, or any one or more of the others of the said children and issue respectively, and to vest at such age or ages, day or days, and upon such contingencies as the said T. A. Perry at any time or times, and from time to time," by deed or will should appoint; and, in default of appointment, for all the children of the said T. A. Perry to be equally divided among them in equal shares as tenants in common, and his, her, or their heirs, executors, administrators, and assigns forever, to be vested in such of the same children respectively as should be a son or sons at twenty-one years or death under that age leaving issue living at his or their deaths, and in such of the same children respectively as should be a daughter or daughters at twenty-one years. The settlement then contained a power for T. A. Perry to give to any woman he might marry an annuity for her life by way of jointure. The deed then contained the following clause: "And it is hereby declared that, unless the contrary shall be directed by any appointment or appointments to be made as aforesaid, it shall be lawful for the trustee or trustees for the time being of these presents, at any time after the decease of the said T. A. Perry, to apply all or any part of the rents and profits, dividends, interest, and income arising from the share of each or either of the children or issue of the said T. A. Perry, for the

¹ 20 Law J. Rep. (N. S.) Chanc. 429.

Gardner v. Perry.

time being entitled to shares of and in the said trust estates, moneys and premises, during his or her minority, in or towards his or her maintenance, education, schooling, clothing, or advancement, in such manner as the trustee or trustees for the time being shall think fit, and also by mortgage, sale, or other disposition of all or any part of the share of each, any, or either of the same children or issue of and in the said trust estates, moneys, and premises, or any of them, to raise, advance, and pay to or for each, any, or either of the same children or issue, and notwithstanding his or her minority, any part not exceeding one half, or any sum not exceeding one half in value (of which value the trustee or trustees for the time being of these presents shall be the sole judge or judges) of the share of the then vested or expectant share of the same child or issue of and in the said trust estates, moneys, and premises, for placing out any such child or issue, being a male, to any profession, business, or employment, or for the benefit, or advancement, or preferment in the world of any such child or children, being either male or female." There was no hotchpot clause in the settlement.

In June, 1827, T. A. Perry married Mary Ann Granaway.

By indentures of lease and release, dated respectively the 19th and 20th of June, 1827, and made in contemplation of this marriage, new trustees were appointed of the last-mentioned settlement, which was at the same time ratified and confirmed by Mr. Perry.

Mary Ann Perry died in 1836. There were two children of this marriage and no more, namely, M. A. G. Perry and J. C. F. A. Perry.

In October, 1836, Mr. Perry married Katherine Martha Miles.

By indentures, dated the 11th and 12th of October, 1836, made in contemplation of this marriage, Mr. Perry appointed for Katherine Martha, his wife, an annuity of 200*l.* by way of jointure, and directed the trustees of the settlement to raise portions for the children of the marriage, in the following language:—

"If there shall be but one child of the said intended marriage, to raise and levy, by sale or mortgage of the said trust estates and premises, the sum of 2000*l.*, as and for the portion of that one child, and to be paid to such child, being a son at his age of twenty-one years, and being a daughter at her age of twenty-one years, or day of marriage under that age, (with the consent of her guardian or guardians for the time being,) which shall first happen after the decease of the survivor of them, the said T. A. Perry and K. M. Miles; but, if the same shall happen in the lifetime of the said T. A. Perry and K. M. Miles, or in the lifetime of the survivor of them, then immediately after the decease of such survivor, and, if there shall be two such children only, then to raise and levy in like manner the sum of 4000*l.* as and for the portions of such children; and if there shall be three or more such children, then to raise and levy in like manner the sum of 6000*l.* as and for the portions of such children, such sums to be respectively divided amongst them in equal shares, with survivorship to the remaining child or children; if any such child or children shall die before the portion or share of such child or children shall become payable, the said shares or portions to be

Gardner v. Perry.

payable in like manner as directed in the event of there being only one child of such then intended marriage."

The settlement contained a power for the trustees, at any time or times after the decease of the survivor of them, the said T. A. Perry and K. M. Miles, or in the lifetime of them or the survivor of them, in case he or she should so direct, by any writing or writings under their, his, or her hands or hand, to levy and raise, and to pay and apply, for the advancement and preferment in the world or otherwise for the benefit of any child or children of the said T. A. Perry by the said K. M. Miles, any sum or sums of money, not exceeding in the whole one moiety or equal half part of the then vested or then presumptive portion or portions of such child or children, and the same should be considered and taken in part of the said portion or respective portions intended to be provided for such child or children as aforesaid; and that, after the decease of the survivor of them, the said T. A. Perry and K. M. Miles, in the mean time and until the portion or respective portions intended to be provided for the child or children for the time being of the said intended marriage or any part thereof respectively should be payable, the trustees should pay and apply the whole or such part as they or he might think fit, of the interest and annual produce of the portion or respective portions to which such child or children might for the time being be entitled in expectancy, for his, her, or their maintenance and education.

By a deed poll, dated the 29th of December, 1836, Mr. Perry, in pursuance of the power contained in the settlement of 1826, directed that the trust premises should, subject to his life estate, be charged and chargeable with the payment of 2000*l.* for each of the two children of the first marriage, with interest for the same from his death until payment, after the rate of 5*l.* per cent.

In September, 1849, Mr. Perry died.

There were two children only of the second marriage, namely, W. H. Perry and K. M. Perry.

The bill in this case was filed by the trustees of the first settlement against the widow and the four children of the testator. The only question in the cause was, whether the children of the second marriage were entitled to interest on their portions between the death of Mr. Perry and that of his widow.

The income of the trust property was about 500*l.* a year. Of this the testator had appointed 200*l.* a year for the widow, and 200*l.* a year in respect of interest on the portions of the children of the first marriage. If it were held that the children of the second marriage were entitled to interest, there would be 300*l.* a year to be divided between all the children. If it should be held that they were not so entitled, there would be 100*l.* a year unappointed; which would, therefore, belong to all the children under the trust in default of appointment.

Mr. C. C. Barber, for the plaintiffs.

Mr. Rolt and *Mr. B. L. Chapman*, for the children of the first marriage. The testator has, by the second settlement, appointed portions

Zulueta v. Vinent.

for the children of the second marriage, with an express direction that the sums appointed were not to be paid until after the death of the widow. He has also given an express direction that interest was to be given to these children on their portions after the death of the widow. These express directions exclude any implication that interest is to be allowed before the death of the widow. It will be argued that they are entitled to interest under the maintenance clause in the first settlement. But, in the first place, that clause does not apply to sums to be appointed, but merely to the unappointed shares; and, secondly, there is this express qualification there introduced, "unless the contrary shall be directed by any appointment," and it must be taken that the contrary has been directed by the clauses in the second settlement. The case, however, does not rest there, as, in fact, it is covered by authority. *Butler v. Duncomb*, 1 P. Wms. 453. *Churchman v. Harvey*, 1 Amb. 335. *Verney v. Earl Verney*, 2 Eden, 26. *Hume v. Rundell*, 2 Sim. & S. 174. *Clayton v. The Earl of Glengall*, 1 D. & War. 11. In all these cases portions had been appointed by a father, payable at a future period, and the court refused to give interest.

Mr. Bethell and *Mr. Osborne*, for the children of the second marriage, contended that they were entitled to interest. This must be taken to be the intention of the testator, as appearing from all the instruments, especially by the maintenance clause in the first settlement. They cited *Lyddon v. Lyddon*, 14 Ves. 558.

LORD CRANWORTH, V. C., said the question in this case was, whether the children of the second marriage were entitled to interest on their portions between the death of the father and the death of the mother. He regretted that he could not arrive at the conclusion that they were entitled. His lordship then stated the facts of the case, and said that there was an express provision that interest was to be paid on the portions from the death of the survivor; therefore, he thought, by necessary implication, that interest was not payable before that event.

ZULUETA v. VINENT.¹

June 24 and 26, 1851.

Injunction — Revival — Common Order — Amended Bill — Affidavit.

The common injunction having been dissolved on the merits shown by the answer, the plaintiffs amended their bill, and upon an affidavit verifying in general terms the truth of the amendments, again obtained an order for the common order:—

Held, that the defendant could not contradict that affidavit, but that it was open to the defendant to show that the answer would not afford the plaintiffs a defence at law, and that the amendments did not materially vary the original case.

¹ 20 Law J. Rep. (N. S.) Chanc. 431.

Zulueta v. Vincent.

THE plaintiffs, upon filing their bill, obtained the common injunction to stay proceedings at law, but upon the coming in of the answer it was dissolved on the merits.

The plaintiffs then amended their bill, and the defendant, who resided in Cuba, having made default in answering the amended bill, the plaintiffs, on the 20th of June, 1851, obtained the common order for an injunction to stay the defendant from proceeding at law until answer or further order, upon an affidavit stating "that to the best of our knowledge, remembrance, information, and belief, the facts stated and charged, by way of amendment in our bill in this suit, are each and every of them respectively true." The defendant now moved to discharge this order, with costs.

Mr. Lloyd and *Mr. Willcock*, for the defendant, in support of the motion, referred to *Eyton v. Mostyn*, 13 Jurist, 975, 16th order of May, 1845, arts. 14, 36, 37, Ord. Can. 201, 288; 14 Law J. Rep. (N. S.) Chanc. 283, 286; 3d order of 9th of May, 1839, Ord. Can. 136; 8 Law J. Rep. (N. S.) Chanc. 273; 10th order of 21st of December, 1833, Ord. Can. 46; 3 Law J. Rep. (N. S.) Chanc. 2; *James v. Downes*, 18 Ves. 522; *Thorpe v. Hughes*, 3 Myl. & Cr. 742; s. c. 7 Law J. Rep. (N. S.) Chanc. 145; and *Gregory v. Wilson*, 11 Jurist, 1095, and contended that the plaintiffs, after amending their bill, could not apply, as of course, for a new injunction to stay proceedings, until answer or further order. The merits ought to be stated in the first instance. The court would not allow a plaintiff to bring forward his case upon new grounds, and obtain another injunction, after a former one had been dissolved, upon a variation of the case, supported by an affidavit that the amendments were true. If the plaintiffs were entitled to an injunction, they ought to have applied to the court specially; instead of that, they had obtained an order of course, which did not even refer to the affidavit on which it was obtained, and which the defendant ought to have had an opportunity of answering.

Mr. Roupell and *Mr. Shadwell*, for the plaintiffs. The defendant has made default in not answering the amended bill; the plaintiffs have, therefore, verified the truth of the amendment by affidavit, and were entitled to the injunction, as the court always gives credit to the bill in the first instance when the defendants have made default. *Lee v. Ravenscroft*, 6 Sim. 474; s. c. 5 Law J. Rep. (N. S.) Chanc. 132. But this practice had not been followed in *Brown v. Newall*, 2 Myl. & Cr. 558; s. c. 6 Law J. Rep. (N. S.) Chanc. 348; and *Brooks v. Purton*, Cr. & Ph. 233.

Mr. Lloyd, in reply.

June 26. THE MASTER OF THE ROLLS. I am satisfied that, in the present case, this affidavit cannot be contradicted. Lord Eldon, in *James v. Downes*, observed that the court gives credit to the bill in the first instance if there is a default by the defendant; but, when

Rowley v. Adams.

the common injunction has been dissolved on the merits, the court will not give credit to the amendments, and upon granting a second injunction it will require two conditions to be complied with, namely, default on the part of the defendants, and an affidavit of the truth of the amendments; but he says nothing which would imply that the court on that occasion will try the truth of the amendments. A more inconvenient course can scarce be conceived than to have the merits of the case tried on affidavits in the first instance, and then repeated a second time upon the answer coming in. The reason for requiring an affidavit of the truth of the amendments, is to guard against plaintiffs putting upon the record a mere fictitious case by amendment. The court requires notice to be given to the defendant to enable him to show that the amendments, if true, do not materially vary the case on which the court has already dissolved the injunction. I believe that there is not any case in which either this affidavit or the affidavit to extend the common injunction has been allowed to be contradicted; but it is open to the defendant to show, in the first instance, that it is impossible, on the plaintiff's statement, that the answer can afford a defence at law; and, in the second, to show that the case is not materially varied by the amendments.

I conceive that the injunction to be granted will not stay trial, but that a motion must be made to extend it on the next seal.

ROWLEY v. ADAMS.¹

May 28, 29, and June 9, 1851.

Trustee — 13 & 14 Vict. c. 60 — Copyholds — Decree for Sale — Legal Estate — Refusal to surrender — Vesting Order — Feme Covert.

Copyhold estates were sold for payment of legacies, under an order of court, which directed all proper parties to join in surrendering the property. The purchasers of three lots paid their purchase money into court, and required a surrender to be made to them. The legal estate was vested in a married woman, who wrote to the purchasers of two of the lots, disputing the legality of the sale and refusing to convey, but she gave no refusal as to the other lot. Her husband, who was interested in the estate through her, gave no refusal as to any of the lots. Upon a petition by the plaintiffs, under the 13 & 14 Vict. c. 60:—

Held, that the refusal enabled the court to make an order that the married woman, or some person in her place, should surrender; but that, where there had been no refusal, the court would not make any order either on the husband or the wife:—

Held, also, that if the husband and wife had refused to execute a proper deed, this court would have made an order vesting the estate in the purchasers, but that the notice served did not enable the court to make the order:—

Held, also, that the husband and wife could not raise any objection to the petition for multifariousness, though it was supported by several parties having several interests.

¹ 20 Law J. Rep. (N. S.) Chanc. 436.

Rowley v. Adams.

By a decree made in 1845, it was declared that the plaintiffs were entitled to have certain estates of the testator in the cause sold for the payment of their two legacies of 12,000*l.* each, and it was ordered that the estates, a portion of which was copyhold, should be sold with the approbation of the master, and that a conveyance thereof to the purchasers should be made, wherein all proper parties were to join, as the master should direct. The legal estate in the copyholds was vested in Emily, the wife of the defendant, George Wyatt, both of whom were parties to the cause. The copyholds were accordingly sold in lots; and the lots numbered 1, 4, and 13, formed the subject of the present petition. As to these, the sales had been confirmed, and the purchasers had paid their purchase money into court. On the 12th of April, 1850, George Wyatt and Emily his wife were served with a written notice requiring them to convey and surrender the three lots to the use of the several purchasers, and to execute all deeds and documents, and to do all such acts, as might be necessary. The notice stated that the steward of the manor would attend at any reasonable time or place for the purpose of taking the surrenders, &c., and that, in default of their complying within twenty-eight days, application would be made to the court for an order to vest the same in the purchasers, under the 13 & 14 Vict. c. 60. On the 14th of April, 1850, Emily Wyatt wrote to the purchasers of lots 4 and 13, expressing her determination never to surrender the copyholds; and no surrender having been made within the time specified, the plaintiffs in the cause presented this petition, alleging that Emily Wyatt and her husband were trustees of the copyholds for the petitioners, or for the respective purchasers within the meaning of the 13 & 14 Vict. c. 60, s. 17, 30, and praying for an order to vest the legal estate in the lands in the respective purchasers.

By sect. 17, it was enacted, "That where any person jointly or solely seized or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate." This application was made against Mrs. Wyatt as to the two lots on the ground of her expressly refusing to surrender, and against Mr. Wyatt on the ground that his wife must be considered as acting under his authority, and against them both on the ground that service of the written notice was the same in effect as if a deed had been tendered to them, and that it brought the case within the 13. & 14 Vict. c. 60, s. 17, 28, 30.

Rowley v. Adams.

Mr. Roundell Palmer and *Mr. Erskine* appeared for the plaintiffs, in support of the petition; and upon its being objected that the purchasers ought to have been the petitioners, consented to their being joined with the plaintiffs as co-petitioners.

Mr. Prendergast, for *Mr. and Mrs. Wyatt*. The 13 & 14 Vict. c. 60, relates to trusts and mortgages created by the parties themselves, and not to constructive trusts made on declarations of the court. The words, "or otherwise," in sect. 30, cannot be considered as giving indefinite power to the court; they are limited to the cases enumerated in the preceding part of the section. A married woman's interest is not lightly to be dealt with; she is not to be deprived of her estate in the absence of express enactment; neither can the court execute forms of conveyance contrived for her protection, simply upon its own declaration. It is necessary that *Mrs. Wyatt* herself should be examined; she was the legal owner subject to these legacies, and is not a trustee. The sale, also, was not made for payment of the testator's debts. Where real estates were sold under a decree for administration, a *feme covert*, who was heir at law of the deceased, was considered to be a trustee within the 1 Will. 4, c. 60, but no final decision was come to. *Billing v. Webb*, 1 De Gex & Sm. 716. *Mrs. Wyatt* could not be convicted for contempt in disobeying this order; the forms of the act had not been complied with; a surrender could not be termed a deed, neither could a notice. The power given to the court of making vesting orders was a dangerous innovation upon the transfer of real estate. The interests of married women and remainder-men might be made responsible for the *mala fides* of trustees, and their interests swept away under the double operation of trusts by construction, and by the costs of resisting a wrong. The law repudiated the idea of making a will for a testator; but if this petition prevailed, the same effect could be obtained through the medium of trusts created by a court of equity. The petition is also multifarious, inasmuch as it asks for an order upon a matter relating to three purchases, all differing in the circumstances under which they were made.

Mr. Chandless appeared for *Mr. Woods*, one of the purchasers. The petition is presented by the plaintiffs. *Mr. and Mrs. Wyatt* could not be trustees for them; if they were trustees at all, it was for the purchasers, and they were the parties to present the petition. In a suit by an equitable mortgagee of leaseholds, a decree was made for sale; the mortgagor, who was out of the jurisdiction, was, under 1 Will. 4, c. 60, held not to be a trustee for the purchaser, but for the plaintiff, and a person was appointed to execute the assignment in his place. *King v. Leach*, 2 Hare, 57; and *Hood v. Hall*, 19 Law J. Rep. (n. s.) Chanc. 312. And where a decree was made for the sale of lands to satisfy charges created prior to the estate of a lunatic defendant who had not been found so by inquisition, a similar order was made to appoint a person to convey the lands to the purchaser. *In re Blake*, 3 Jones & Lat. 265, and *Barfield v. Rogers*, 13 Law J.

Rowley v. Adams.

Rep. (N. S.) Chanc. 262. Infants and married women were not amenable to the process of contempt for disobeying the orders. An infant devisee was ordered to convey real estates sold for payment of debts; he did not comply with the order, and was held not amenable to process. *Thomas v. Gwynne*, 9 Beav. 275. A married woman also had been treated as a *feme sole* throughout the whole proceedings in the suit, and with her husband had executed a conveyance in obedience to a decree of the court; but though her husband covenanted that she should levy a fine, none was levied. Upon an objection to the title, on a subsequent sale, it was held to be not one of title, but of conveyance, as the order in chancery, notwithstanding its informality, was binding on a married woman, and rendered her a trustee for the purchaser, and that she was compellable to complete the legal title. *Jumpson v. Pitchers*, 1 Coll. 13; s. c. 13 Law J. Rep. (N. S.) Chanc. 166. The whole of this proceeding was novel. The court first ordered a sale; until then no person dreamed of Mr. and Mrs. Wyatt being trustees; a sale takes place, and they refuse to obey the order, upon which the court declares them trustees, and directs a conveyance. But the court must know the property in respect of which it is called upon to make the order, and it could do nothing until the master had directed the parties to convey. Mrs. Wyatt might not have refused to obey the direction of the master. In the absence of these forms no attachment could be issued, and no default was committed within the meaning of the act. The purchasers desired to have the legal title, and not to be liable to any subsequent question. The act, as framed, had reference to mortgagees and trustees; and if it did apply to this case, the interpretation clause must be considered as forming a part of the act, and read as if it formed a part of the several clauses. In this case, it might be considered whether the court would direct all those necessary forms to be gone through, for the purpose of passing the various interests to which married women and other parties might become entitled in real estates.

Mr. Roundell Palmer, in reply. A surrender by the wife alone could not be accepted. The interest of the husband and wife is inseparable; and where the property is not settled to the separate use of the wife, she must defend by her husband, and be bound by his acts.

THE MASTER OF THE ROLLS. The court must be satisfied that Mr. and Mrs. Wyatt are trustees within the meaning of the act, previous to considering whether it can make the order asked by this petition.

From the facts stated, it appears that the plaintiffs are entitled to a charge upon the copyholds in question, and subject to that Mrs. Wyatt is entitled to the estates, and Mr. Wyatt, in right of his wife, is entitled to an interest in them, and a surrender is required from them both in order to vest the legal estate in the purchasers. The court has ordered those copyholds to be sold, and has ordered all proper persons to join in the surrenders. The property has accordingly been

Rowley v. Adams.

sold, and the first lot has been purchased by Henry Woods, and the fourth lot by Hannah Maria Ware, and the thirteenth lot by the Rev. G. Lindsay. An application has been duly made to Mr. and Mrs. Wyatt to surrender the copyholds to those purchasers. Mrs. Wyatt has refused in writing to convey or surrender, or to do any thing relating to lots 4 and 13, to vest the same in the purchasers.

In this state of circumstances, this petition is presented by the plaintiffs; and the first objection is, that the petition is presented by the plaintiffs, and that Mr. and Mrs. Wyatt cannot be trustees for the plaintiffs, if they are trustees at all, but that they must be trustees for the purchasers; and, therefore, that the application must be made by the purchasers.

In answer to this objection, the case of *King v. Leach* has been referred to; and there, though not expressly argued, the point is expressly decided. I do not think it necessary to make any express decision upon the argument raised on the authority of that case, as the plaintiffs are willing to allow the purchasers to be made co-petitioners. I should be sorry to differ in opinion with Sir James Wigram; but should the point arise before me, I will consider the whole of the facts; but at present, the objection is removed.

Mr. Wyatt has not refused to surrender any portion of those lots; I think, therefore, that I cannot, on the ground of refusal, order any person to surrender the copyholds in his place. As to lots 4 and 13, Mrs. Wyatt has given an express refusal to two of the purchasers. As to these, I think the court can clearly make the order upon Mrs. Wyatt, or some person in her place, to surrender to the purchasers the legal estate in the copyholds comprised in those lots; and I shall accordingly direct such surrender to be made. Mrs. Wyatt has not refused to surrender the remaining lot; I am not, therefore, at liberty to make the order on the ground of refusal.

The next question arises under the 13 and 14 Vict. c. 60, s. 17, and it is necessary to consider whether the words have been satisfied. He has undoubtedly neglected or refused to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same has been tendered to him, provided the facts I am about to mention can be treated as a sufficient tender under the construction of the act. What took place was this: A notice was duly served upon Mr. and Mrs. Wyatt, in which they were required, in the most formal and distinct manner, to do all those things which were necessary for the purpose of vesting the copyholds in the purchasers. It does not in express words call upon them to take all those steps which are necessary for the purpose of vesting the copyholds in these purchasers. Upon the mere words of the clause it is evident that it does not satisfy them, because this cannot be called a proper deed for conveying or assigning the copyholds; it is merely a notice requiring them to take those steps which shall be necessary for the purpose of vesting the legal estate of the copyholds in the purchasers; but then it is said, and with a very considerable appearance of justice and reason, that the words of the interpretation clause, which relate to a conveyance, mean "the execution by such

Rowley v. Adams.

person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seized or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail," and so forth, "and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to, or in aid of, a complete assurance of such customary or copyhold lands."

It was admitted, that the 17th section, where the word "convey" is used, must be read in the same manner as if so much of the interpretation clause as relates to this particular subject were introduced into, and formed a portion of, the 17th section; and that, therefore, it must be read, "shall refuse to convey or assign;" that is, shall refuse not merely to convey or assign, but to do all other acts necessary for surrendering and the like, twenty-eight days after a proper deed for conveying or assigning the same shall have been tendered to him. Now, the deed for conveying or assigning means here a deed which shall enable him to make such surrenders, provided there is any deed capable of effecting that object. If these be not the words, it appears to me to be inaccurate; that is to say, to have no distinct meaning attached to them; and, by the 17th section, it proposes that something shall be tendered to the person to execute, which is in its nature capable of being tendered; and that, consequently, you must read the word "deed" there, if it be possible, as a deed for conveying or assigning the same, and as a deed for doing all those other acts, such as surrenders and the like, which are necessary for the purpose of giving full and complete effect to a conveyance or surrender; and if any such deed had been tendered, I should have been prepared to make the declaration under the 30th section, and to have ordered the vesting of the property accordingly. But what was tendered to them was merely a notice requiring them to do certain acts. I cannot by any mode of reading this clause construe it to extend to their neglect to do certain acts required of them by notice, because the clause is expressed in the one alternative a refusal, or in the other a neglect to execute a deed that may be necessary, not merely for a conveyance or assignment, but also for all those acts which may be necessary for the purpose of giving validity to a conveyance, assignment, or surrender, or any other formality, which, by law, is required for the purpose of vesting the legal estate in the purchasers. All, therefore, I can do, is to make an order with respect to the two copyhold lots against Mrs. Wyatt; and after what I have stated I apprehend it will not be difficult to place the parties in a position to get the court to make a proper declaration with respect to the remaining lot, and I shall then be prepared to act upon the opinion which I have expressed.

The case is of importance, because the validity of titles may depend upon it, and I shall be very glad if my opinion can be corrected by the opinion of a higher tribunal. It is of great importance that a

Morgan v. Morgan.

question of this description should be set right, as it may affect hereafter suits for specific performance, and the court may be compelling purchasers to take titles that they may think bad. I have given this case the most careful attention, and I believe the conclusion I have come to is the right one, and I am prepared to act upon it accordingly; at the same time, if wrong, I shall be glad to have it corrected.

Mr. Ware, for one of the successful purchasers. I apprehend that two separate petitions will not be necessary.

The MASTER OF THE ROLLS. No; they may all join in one petition. *Mr. and Mrs. Wyatt* cannot take any objection that the petition is multifarious. I have not jurisdiction, or I would make them pay the costs of the whole petition.

MORGAN v. MORGAN.¹

February 28, 1851.

Accumulation — Thellusson Act — Tenant for Life.

A testator gave a legacy of 5000*l.* to A. on her marriage, and gave the residue of his personal estate to B. for life, with remainder to C., and died in 1825. Upwards of twenty-one years elapsed from the death of the testator, and A. was not married. B. died in 1838, and the twenty-one years from the death of the testator expired in 1846. At this time the legacy fund consisted, first, of the original legacy; and, secondly, of the interest on the legacy accumulated for the twenty-one years, called "the accumulation fund:" —

Held, that the interest of the 5000*l.* accrued, and to accrue, between 1846 and the death or marriage of A., belonged to C.; that the interest on such part of "the accumulation fund" as was produced between 1825 and 1838, accrued, and to accrue, between 1846 and the death or marriage of A., belonged to the personal representatives of B.; and that the interest on the remaining part of "the accumulation fund" accrued, and to accrue in like manner, belonged to C.

THIS case is reported, 20 Law J. Rep. (N. S.) Chanc. 109; s. c. 2 Eng. Rep. 35.

According to the decision on the third question submitted to the court, it was ordered that the income of the legacy of 5000*l.*, given to Miss Frances Sarah Gyles, on her marriage, accrued, and to accrue, between the expiration of twenty-one years after the death of the testatrix and the death or marriage of Miss Frances Sarah Gyles, should be paid to the residuary legatees of the testatrix in remainder after the life estate of Mrs. Hanham, the tenant for life.

The cause came on again this day for the purpose of obtaining the directions of the court as to the disposition of the income of the fund arising from the income of this legacy of 5000*l.*, accrued between the

¹ 20 Law J. Rep. (N. S.) Chanc. 441.

Houghton v. Barnett.

death of the testatrix and the expiration of twenty-one years from her death.

Mr. Russell, Mr. Goldsmid, Mr. Wigram, Mr. Cotton, Mr. R. Palmer, Mr. Ferrers, Mr. Wickens, Mr. Rolt, and Mr. Metcalfe, for the different parties.

Knight Bruce, V. C., directed that the income accrued, and to accrue, between the expiration of twenty-one years from the death of the testatrix and the death or marriage of Miss F. S. Gyles, on such part of this fund as arose from the income of the 5000*l.* accrued between the death of the testatrix and the death of Mrs. Hanham, the tenant for life, should be paid to the personal representatives of Mrs. Hanham, and that the income accrued, and to accrue, between the expiration of the twenty-one years from the death of the testatrix and the death or marriage of Miss F. S. Gyles, on the remainder of the fund, should be paid to the residuary legatees in remainder after the death of Mrs. Hanham.

HUGHTON V. BARNETT.¹

May 1, 1851.

Answer — Insufficiency.

A defendant, in his answer to the usual interrogatory as to deeds, &c., stated that he had, in the schedule thereto, set forth a list of all the deeds, &c., relating to the matters in question in the suit, and traversed the interrogatory. One of the items in the schedule was "Banker's Pass Book:"—

Held, that this description was sufficient.

THE defendant in this suit, in his answer to the common interrogatory as to deeds, stated that he had set forth in the schedule to his answer a list of all the deeds, &c., relating to the matters in question, and, save as aforesaid, he denied that he had any deeds, &c., (following the terms of the interrogatory.)

One of the items in the schedule was merely "Banker's Pass Book."

Mr. Malins and *Mr. Southgate*, for the exception, contended, that there had not been a proper description of the banker's book. The plaintiff ought to know whose book the pass book was, and what the bank was. One inconvenience in the imperfect description would be, that the production of the book might be resisted, on motion, on the ground of an inaccurate description, and then the plaintiff might be

¹ 20 Law J. Rep. (N. S.) Chanc. 444.

Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company.

told that he ought to have excepted for insufficiency, as in the case of *Inman v. Whitley*, 7 Beav. 337.

Mr. Baggallay, for the defendant.

KNIGHT BRUCE, V. C., said he thought that the answer was sufficient.

GRAHAM v. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY.¹

May 30, 1850.

Railway Company — Misapplication of Capital — Injunction — Acquiescence.

Though a shareholder in a railway company has an equity to have an injunction to restrain the directors from applying the funds of the company in the completion of a part only of the line with a view to the abandonment of the remainder, yet where the shareholder, with the knowledge of the intention to abandon the greater part of the line, remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the court refused to interfere by injunction.

THIS application was heard by Lord Cottenham, at his private residence. The motion was made, on behalf of the defendants, to dissolve an injunction granted by the master of the rolls, by which the defendants were restrained from making the proposed railway from Chester to Lower Walton only, or from applying the funds of the company otherwise than for the purpose of completing the entirety of the line, and from borrowing a sum of 200,000*l.*, and from making any further call, or enforcing certain calls already made, and from taking proceedings to forfeit shares for non-payment of such calls.

The bill was filed by J. Graham on behalf of himself and all other the shareholders of the company, except the defendants, against the company and the directors.

The bill set forth various acts of Parliament, by the first of which (7 Will. 4, & 1 Vict. c. 107) a company was formed for making a railway from Chester to Birkenhead; which railway had since been completed. By another act, (the 9 & 10 Vict. c. 91,) a company was formed for the purpose of making a railway from the Chester and Birkenhead Railway to the Manchester and Birmingham Railway, with certain branches; and these two companies were consolidated by the 10 & 11 Vict. c. 222. The railway authorized by the secondly-mentioned act was in extent about forty-six miles, and had not been completed. In 1847, in consequence of the great depression of railway property, and the difficulty of raising funds, the directors sus-

¹ 20 Law J. Rep. (N. S.) Chanc. 445.

Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company.

pended their works, and they continued suspended till 1849. During that period a plan was formed for abandoning the line, except that part of it, about seventeen miles in length, which lay between Chester and Lower Walton; and at a special meeting of the shareholders, held on the 25th of November, 1848, this plan was sanctioned; and in the following session the directors introduced a bill into Parliament for carrying it into effect; but this bill was subsequently abandoned.

The capital of the amalgamated company was divided into three classes of shares, viz., shares of 27*l.* 10*s.*, 22*l.*, and 31*l.* each.

In February, 1849, the directors made a call of 10*l.* a share on each of the 31*l.* shares, and in December following declared some of the shares forfeited, on account of non-payment of the calls; and by this means got rid of a suit instituted by one of the shareholders in 1849, for the same purpose as the present suit. In January, 1850, a resolution was carried at a meeting of the shareholders, that 200,000*l.* should be borrowed by the company, notwithstanding their powers of borrowing under the act had not arisen, as one half of the capital had not been paid up. The directors then made two further calls of 2*l.* and 3*l.* on each of the 22*l.* and 31*l.* shares respectively, having previously resumed the construction of that part of the line which lay between Chester and Lower Walton.

In February, 1850, Dumvile, a dissentient shareholder of the company, filed a bill for objects similar to those of the present suit; but that bill was afterwards dismissed by consent.

The present bill was filed on the 4th of May, 1850, and it charged that the calls of 10*l.*, 3*l.*, and 2*l.* were made for the purpose of completing that part of the line between Chester and Lower Walton only, and that such an application of the funds of the company was illegal; and it prayed a declaration that it was not within the powers of the company to make that portion of the line only, or to apply the funds of the company for that purpose; or to enforce the calls or to raise money by loans for that purpose, and for an injunction.

The principal point relied on by the defendants against the injunction was, the acquiescence of the plaintiff and those whom he represented in the proceedings of the directors, since the resolutions carried at the meeting of the 25th of November, 1848, and that the directors since that time had expended large sums, and come under heavy liabilities, in completing the portion of the line between Chester and Lower Walton; all which money would be utterly lost to the company if the present injunction was sustained.

Mr. Bethell, Mr. Roupell, and Mr. Glasse appeared in support of the motion.

Mr. R. Palmer and Mr. Cole, in support of the order below.

The LORD CHANCELLOR. I feel great difficulty and anxiety on this matter, because, undoubtedly, the principle laid down in the cases referred to is one to which I must adhere, and from which I see no ground for departing. Parties who have subscribed their money for

Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company.

one purpose are not to be told that the directors or a majority of the company are of opinion that it would be very advantageous to employ it for another. But the difficulty I have here is whether, in this case, the interference by way of injunction, which is the mode in which the court exercises its jurisdiction to enforce an equity, is not counteracted by a counter equity on the other side; because, in many of these cases, the interposition of the court may produce the greatest possible injustice if the parties have not applied in time, but have permitted things to get into that state which makes the injunction a proceeding not only not enforcing an equity, but calculated to inflict great hardship and injustice.

Now, what are the facts of this case? I do not mean to go into a detail of dates; but the fact is, that long ago every shareholder, who took the trouble to inform himself of the state of the property in which he had embarked, must have been aware that the whole scheme could not be carried out. This was distinctly known in November, 1848. The moment it was known that the whole scheme could not be carried out, the question arose whether the party who subscribed his money did, or did not, acquiesce in its being applied to carry out the works so far as the money would go. A considerable period of time has elapsed since that knowledge came to every one of the parties who are represented by the plaintiff in this suit; and for this purpose it is immaterial whether they have paid their calls or not. I am speaking of those parties represented by the plaintiff, and he seems to have had that knowledge. Well, then, from November, 1848, down to the time when the bill was filed, the company, knowing they could not complete the whole work, proceed to carry it on to a certain extent, continue a contract which is of an earlier date than that, with the party who contracted to do the work, lay out large sums of money for keeping the contractor at work, and, of course, come under liabilities to him. Was it not the duty of those who meant to dispute that, to make an application at once to a court of equity to prevent it? It seems to me that the moment that fact came to the knowledge of any individual member of the company, he (knowing that the company, in the existing state of their finances, intended to go on with the work as far only as they could) ought to have made an application to stop them; and the question is, whether by not doing so he has not given rise to a new equity against himself, which deprives him of the right to prevent the company from doing that which was contrary to the right which the shareholders had. I have not been able to discover any answer to that. It is said there was the filing of the bill by Dumville, but that led to a compromise, and turned out to be nothing; and is that any answer at all to the right of these parties? It seems to me that this is quite beside any case that I have hitherto heard; because in the case of *Cohen v. Wilkinson*, 1 Hall & Twells, 554; s. c. 1 Mac. & Gor. 481; 18 Law J. Rep. (N. S.) Chanc. 411, there was no case made of that sort of acquiescence which we have here. This is the equity between the parties: if those who have the management of the affairs of others depart from the regular course, and there is an acquiescence,

Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company.

the parties interested who have so acquiesced cannot complain of their conduct in that mode of dealing with their affairs. That creates the difficulty on the part of the plaintiff in associating himself with the whole body of shareholders; because, if that was so with regard to one, probably it was so with regard to others: at all events, it is an answer to those on whose behalf the plaintiff sues. It appears to me that the plaintiff has not removed the bar to the interference of the court, which arises from his own acquiescence. He knew the intention of the directors in November, 1848; he knew it, certainly, when the company endeavored to get the authority of Parliament to carry out part of their plan. It was their wish and intention to get the authority of Parliament, but having failed to obtain it, they go on with the works, thereby announcing to all concerned that, although Parliament had not sanctioned it, they shall proceed with their plan, trusting to the acquiescence or the approbation of those who were interested in making the most of the property which they had acquired.

Now, of course, a great deal of care and discretion is required in administering that sort of jurisdiction which arises with reference to these injunctions. The object is to protect the interests of the parties, whatever the situation of the parties may be. If the court saw clearly that, instead of protecting their interests, it would tend to the ruin of the great body of those concerned, the court would be very cautious in exercising its authority. Seeing that these works have proceeded as they have for some time,—seeing the large expenditure which has been made,—considering the nearness of the completion, and the comparatively small sum which will be required to complete them,—how can it be supposed that any body, having a legitimate interest in the ultimate realization of profit from the works to be carried on, could derive any benefit from the injunction? What can be the result, if the injunction be continued? The result must be not only the loss of all the money which has been expended, but the property will go away altogether. There will be an end of the whole concern, and every shareholder will lose the whole of his money. That is a result that would be most lamentable, and one which the court would be sorry should result from any order it might make. I do not feel bold enough to administer an equity, from the administration of which such frightful consequences are almost sure to arise. But what is there on the other side? There is the danger of permitting money to be laid out in a mode which, I may say, was not a mode of expenditure which the acts of Parliament contemplated. The question is, whether those who are now complaining and suing in respect of their interest in the money which they have paid have, by the course of conduct which they have pursued, precluded themselves from coming to a court of equity to keep the parties strictly to that which was originally their right under the act. Such matters must be in the discretion of the court; and in the exercise of that discretion, I cannot say that I think it is at all doubtful which way the interest of the parties would be best consulted. As the matter stands, my opinion certainly is, that the interests of the parties would be best consulted if I were not to interfere by way of injunction.

Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company.

But assuming that the parties knew, as they must have known, what the course of proceeding was, I consider that they have precluded themselves from coming to a court of equity to ask for the exercise of its extraordinary jurisdiction, by the course which they have pursued in not coming earlier. On that ground, therefore, although it becomes a matter of extreme delicacy with regard to cases which have been decided, and which may hereafter arise, to say what acquiescence is, I shall refuse to interfere by injunction in this case; and I must say, with a view to the decision of the present case, when I find knowledge accessible at all events, and probably possessed, on the part of the plaintiff, as to what must be the result,—for the matter was not curable, because it was a failure not from accident or any other cause which could be remedied, but it was an actual failure from the state of the money market, placing the finances of the company in a state which rendered it hopeless that the whole scheme would be carried out,—I must say it was the duty of the plaintiff, as soon as there was this manifestation of intention on the part of the company to carry out a work which must of necessity be of less extent than they had originally anticipated, to have inquired how the matter stood; and if they wanted the interposition of a court of equity, to have applied at once, and to have seen what a court of equity would say in that state of things. It has not been suggested what possible remedy there could be for the expenditure that has been made, if the whole work is now stopped. It is a frightful sum to expend under any circumstances; but if the expenditure of that sum is to end in nothing being done,—in the works never being completed,—it may entail ruin upon a great many people without there being the least possibility of good to any body. It is also, no doubt, matter of consideration that the plaintiff, and those on whose behalf he files this bill, or some of them at least, (although it may not be owing to their failure in particular, in paying calls, that the works cannot be carried on to the full extent,) are defaulters, and that as a body a large sum is due from them, which creates, or tends to create, the difficulty which is supposed to give rise to the jurisdiction of the court. Therefore, without feeling at all confident that the master of the rolls is not right in the conclusion to which he has come, I am bound to exercise the best discretion I can in reviewing his opinion; and upon the ground of acquiescence it is that I consider the granting of the injunction as acting too stringently on an admitted rule. No doubt that rule should be acted upon in cases to which it is properly applicable, but it must be mitigated and confined within those limits which the rights of the parties require. I decide nothing; but I think the circumstances of this case are such as to preclude the plaintiff from calling for the interposition of the court; and that, therefore, the injunction must be dissolved.

His lordship continued the injunction to restrain the borrowing of 200,000*l.* until one half of the capital should have been paid up.

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

RUSSELL v. THE EAST ANGLIAN RAILWAY COMPANY; *ex parte*
BOWES.¹

December 16, 17, 18, 19, and 20, 1850.

*Companies Clauses Consolidation Act, 1845 — Bond Creditors —
Equitable Lien — Receiver — Practice.*

By the 36th section of the Companies Clauses Consolidation Act, 1845, all creditors of a company have a right of levying execution against the property or effects of the company.

The 44th section of the same act declares that the obligees of railway bonds shall be entitled to be paid out of the tolls or other property or effects of the company, without preference on account of the date of the bond:—

Held, upon the construction of the 36th and 44th sections, that the 44th section did not create a specific lien in favor of bond creditors upon the tolls or other property or effects of the company, and that this construction is not altered by the 32d section of the special act, (*ut infra*.)

By the 53d and 54th sections of the Companies Clauses Consolidation Act, mortgagees, who should by the special act be empowered to enforce their claims by the appointment of a receiver, were authorized to apply to two justices for the appointment of a receiver of the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, &c.

By the 32d section of the special act, mortgagees and bond creditors were declared to be entitled to be paid *pari passu*, and without preference one above the other, out of the tolls and other estate and effects of the company. And by the 33d section of the special act, it was declared that it should be lawful for the mortgagees or bond creditors of the company to enforce the payment of the arrears of principal and interest by the appointment of a receiver:—

Held, that the receiver spoken of in the 33d section is the receiver to be appointed by two justices under the 53d and 54th sections of the Companies Clauses Consolidation Act, and that the 33d section did not extend the rights of the bond creditors as regarded an equitable lien.

Bond creditors of the company having obtained an order of the court below appointing a receiver, which this court was of opinion they ought not to have obtained, an execution creditor was allowed to levy, notwithstanding the goods and effects were in the possession of the receiver; and the court declined to order that the execution creditor should be examined *pro interesse suo*, all the facts necessary for the decision being before the court upon petition.

WHEN this case (which is twice reported in 14 Jur.) was last before the court, (14 Jur. 1033; 1 Eng. Rep. 101,) the question which was then much discussed—namely, the effect of the special act of Parliament by which the company was incorporated, and the Companies Clauses Consolidation Act, 8 Vict. c. 16, upon the respective rights of bond creditors, execution creditors, and mortgage creditors—was not decided by the lord chancellor. That question now came on to be discussed, upon the petition of the execution creditors, Messrs. Bowes & Co. The petition prayed, in the alternative, that the receiver might be ordered to pay to them the amount of their debt, interest, and costs, out of the moneys of the company in his hands, or that they might be at liberty to enforce their judgment against the company; and that the sheriff might be at liberty to execute the writ of *fi. fa.* against the company in due course of law. The petition referred to the act of Parliament, 10 & 11 Vict. c. 275, whereby the above railway com-

¹ 15 Jur. 935.

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

pany was incorporated, and stated that the Companies Clauses Consolidation Act, 8 Vict. c. 16, was incorporated into that act, and that the entire capital of the company had been paid up. The petition stated that the company became indebted to the petitioners, upon simple contract, in the sum of 1147*l.* 13*s.* 1*d.* for coke supplied to the company; and that they had brought their action, and issued execution therein, on the 3d of July, 1850. The petition contained various statements, to the effect that the suit of *Russell v. The East Anglian Railway Company* was instituted by Russell, who was a bond creditor of the company, in collusion with and against the company and the other bond creditors and mortgagees of the company, for the purpose of delaying the petitioners, and of preventing them from obtaining the benefit of their execution; that, previous to the filing of that bill, it had been agreed between the plaintiff and the defendants thereto, that the defendants would appear by counsel, and consent to the appointment of a receiver of the estate and effects of the company, upon the motion of the plaintiff; and that it was under these circumstances that on the 25th of June, 1850, Knight Bruce, V. C., made an order, upon the consent of all parties to the suit, appointing William Seppings to take and have the management of the estate and effects of the company, and to have the direction and superintendence of the working of the several railways belonging to, or under the control of, the company, and of all other business of the company, and to collect and receive the tolls and other assets and effects belonging to the company; and it was ordered that the company should deliver up to William Seppings, as such manager and receiver, all the plant, stock, goods, books, accounts, and other estate and effects belonging to the company; and that William Seppings should pass his accounts before the master, and from time to time pay the balances which should be reported due from him into the bank, with the privy of the accountant general of the court, to be there placed to the credit of the cause, subject to the further order of the court. The petition stated that Seppings took possession accordingly on the 29th of June, 1850, and had received sums of money more than sufficient for payment of the petitioners' debt and costs; that by reason of the possession by Seppings of the goods and effects of the company, the petitioners were prevented from enforcing their legal rights against the company; and it submitted that such possession was not consistent with the provisions of the acts of Parliament referred to in the petition, and to the policy of the law; and that the plaintiff Russell had not such an interest in the estate and effects of the company, and especially in their movable goods and chattels, as entitled him to a receiver appointed by the Court of Chancery; and that, in any case, the plaintiff was not entitled to the benefit of the order, it having been obtained by collusion, in the manner and for the purpose above stated. The sections of the Companies Clauses Consolidation Act chiefly referred to in the argument were the 36th, 41st, 42d, 44th, 45th, 53d, and 54th. By the 36th section, which has the following preamble, "And with respect to the remedies of creditors of the company against the shareholders," it is enacted, that "if any execution, either

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up." The 41st section refers to the schedules to the act in which the forms of the mortgage deed and bond are given. (Schedules C. and D.) By the 42d section it is enacted, that "the respective mortgagees shall be entitled, one with another, to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorized." By the 44th section it is enacted, that "the respective obligees in such bond shall proportionally, according to the amount of the moneys secured thereby, be entitled to be paid, out of the tolls or other property or effects of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorized, or otherwise howsoever." By the 45th section, a register of mortgages and bonds is directed to be kept. By the 53d section it is provided, that "where by the special act the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a receiver, then if within thirty days after the interest accruing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the superior courts of law or equity, require the appointment of a receiver, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the superior courts of law or equity, may, if his debt amount to the prescribed sum, alone, or if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees, whose debts, being so in arrear after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver, by an application to be made as hereinafter provided." By the 54th section it is enacted, that "every application for a receiver in the cases aforesaid shall be made to two justices; and on any such application it shall be lawful for such justices, by order in writing, after hearing the parties, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

costs, including the charge of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made, all such tolls and sums of money as aforesaid shall be paid to, and received by, the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed; and after such interest and costs, or such principal, interest, and costs, have been so received, the power of such receiver shall cease." By the 32d section of the special act it was provided, "that the respective mortgages and bond creditors shall be entitled to be paid, out of the tolls and other estate and effects of the company hereby incorporated, the several and respective sums advanced by them, with the interest thereon, ratably, and in proportion one with the other, and without preference the one above the other of them, and in all other respects the provisions of the said Companies Clauses Consolidation Act, 1845, relative to mortgages and bonds, shall be applicable and extend to the mortgages and bonds hereby authorized to be granted." By the 33d section it was enacted, "that it shall be lawful for the mortgagees or bond creditors of the company hereby incorporated to enforce the payment of the arrears of principal and interest due on any such mortgages or bonds, by the appointment of a receiver; and in order to authorize the appointment of such receiver, in the event of the principal money due on such mortgages or bonds not being duly paid, the amount owing to the mortgagees or bond creditors by whom application shall be made shall not be less than 25,000*l.* in the whole.

Rolt and Toller, for the petitioners. The execution creditors contended that the effect of the acts of Parliament was not such as to give a lien to the bond creditors upon the goods and effects of the railway company; and that, if they were entitled to a receiver at all, it was only of the tolls and other sums to be received; that a contrary construction would be monstrous as to its effect upon the rights of simple contract creditors, for it would be tantamount to saying that they should have no remedy whatever against the company's property until the bond and mortgage creditors are satisfied, and that not by sale of the effects, but by the *receipts* of the receiver; that this was not a case, as was argued on the former occasion, for the execution creditor to go into the master's office, and be examined *pro interesse suo*; for here all the *facts* were ascertained, and it was a mere question of law; citing *Dixon v. Smith*, 1 Swanst. 457; and *Empringham v. Short*, 3 Hare, 461; 8 Jur. 856.

Bethell, Lee, Bacon, and Miller, for the plaintiff in the suit, contended that the proper course to be pursued was to allow the petitioners to be examined *pro interesse suo*; that the advantage of that course would be, that all the execution creditors might go in and tender their claims, and then one uniform decision could be had on their rights; whereas, by a contrary course, a decision one way might

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

be come to to-day, and an opposite one to-morrow. Upon the construction of the acts of Parliament, they contended, that, by the Lands Clauses Consolidation Act, two classes of debts were authorized to be contracted, mortgage debts and bond debts, for completing the undertaking; that by that act mortgage creditors were placed in a better position than bond creditors, and that had a mortgage creditor obtained the appointment of a receiver, and then a bond creditor should call for the payment of his debt, he could not take the plant from the mortgagee, and leave the naked undertaking to him; and this, although the mortgagee had no power of sale, and although, by the 44th section, the bond creditor is entitled to a lien, and has acquired a specific interest in the effects of the company; that, in fact, a bond creditor might bring his action, but could not sue out execution, because then he would gain a priority over other bond creditors, which would be contrary to the 44th section.

[*Lord Chancellor.* That only means that priority is not given by reason of the date of the bond.]

The only means whereby the bond creditor could work out his specific charge would be through an equitable execution in this court. *Pontet v. The Basingstoke Canal Company*, 3 Bing. N. C. 433. That the effect of the special act was to abolish this distinction between mortgage and bond creditors, and to give them the same rights; and thereby every thing belonging to the railway was subjected to a charge for both these classes of debts, and all persons afterwards dealing with the company must deal with it subject to these statutory charges. *Doe d. Myatt v. The St. Helen's Railway Company*, 2 Q. B. 364. *Whitworth v. Gaugain*, Cr. & Ph. 325; 5 Jur. 523. Lastly, they contended that the bond creditors, if they required the appointment of a receiver, must come, as they had done, to this court; for that, although the mortgage creditors might have obtained the appointment of a special receiver of the tolls by two justices, under the 53d and 54th sections of the Lands Clauses Consolidation Act, yet that did not apply to an application by a bond creditor; nor did it apply to a receiver of the effects of the company, but merely to a receiver of the tolls; and that there was nothing inconsistent with the practice of this court in appointing a receiver who should manage the business of the company. *Jefferys v. Smith*, 1 J. & W. 298. *Ex parte Ford*, 7 Ves. 617. *Waters v. Taylor*, 15 Ves. 10.

Malins and *Martindale*, for other bond creditors, contended that an execution subsequent to a bill of sale would not defeat the bill of sale; *Martindale v. Booth*, 3 B. & Ad. 498; and that the acts of Parliament in this case amounted to a legislative bill of sale of the effects of the railway in favor of the bond creditors.

[*Lord Chancellor.* Then you contend that the moment a party places coals or any other goods upon a truck on the railway, you may seize it?]

We admit that we must contend to that extent. In this court, a deed may give a lien upon subsequently acquired property. *Metcalfe v. The Archbishop of York*, 1 My. & C. 547. *Langton v. Horton*, 1 Hare, 549.

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

James Parker and Goodeve, for other bond creditors, cited *Mellish v. Brooks*, 3 Beav. 22.

Page Wood and Rogers, for mortgage creditors, took the same line of argument as the bond creditors; citing also *Drewry v. Barnes*, 3 Russ. 94; and case of *Dumville v. Ashbrooke*, in note, p. 98; *Blanchard v. Cawthorne*, 4 Sim. 566; and *Harland v. Binks*, 14 Jur. 979.

Calvert and Baggallay, for the company.

Dickenson and Pryor, for other parties.

Rolt, in reply.

LORD CHANCELLOR. This case having occupied a very considerable time, I have had sufficient opportunity, during the progress of the argument, of forming my opinion upon it; and it does not appear to me to require any longer consideration than I have already given to it. The question in contest between these parties turns upon the construction of certain clauses in two acts of Parliament,—namely, the Companies Clauses Consolidation Act, 8 Vict. c. 16, and the special act under which the present company is established,—the material sections being the 36th, 41st, 42d, 44th, 53d, and 54th of the Companies Clauses Consolidation Act, and the 32d and 33d sections of the special or company's act. Now, it does not appear to me necessary to advert to a great many of the topics which have been brought before me in argument, as illustrating the views which the various counsel have taken. I have looked into all the authorities which have been cited; but it will not be necessary, in order to explain the grounds of my judgment, that I should go through them. The petitioners complain that a receiver has been appointed in this suit by an arrangement between the parties to the cause; and the ground of their complaint is, that the effect of the arrangement was to surprise or mislead the court into making an order for the express purpose of impeding the petitioners in their legal remedy. They insist that the plaintiff was not entitled to this order, and that the court would not have made it if the facts had been disclosed, as they assert they ought to have been; and they therefore pray that they may be permitted to pursue their legal remedy, notwithstanding the existence of the order. The plaintiff, on the other hand, insists that he was well entitled to the order which is complained of, and that, therefore, there was no impropriety in the company giving their consent to that order being made; and the defendants insist that they were well justified in expediting the proceedings, for the purpose of intercepting the petitioners' execution for their own protection. Now, the ground on which it is contended that the receiver was properly appointed is, that in this suit the plaintiff was a bond creditor of the company, and that the defendants appeared on behalf of themselves and the rest of the bondholders and mortgagees of the company. It is then insisted, that under the provisions of the act 8 Vict. c. 16, and the special act

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

of the company, the mortgagees and bond creditors acquired a specific equitable lien on the tolls, estates, and effects of the company, and that the bill filed in this case, and the appointment of the receiver, were proper proceedings with a view of enforcing and rendering effectual that security. There are thus two questions to be decided: First, whether, upon the construction of the statutes which I have mentioned, a specific equitable lien is given to the mortgagees and bond creditors of the company upon the estate and effects generally of the company; and, secondly, whether, if, upon the construction of these acts, no such lien is given, the absence of such lien will or will not entitle the petitioners to any and what order on the present application. The principal clause on which the first question depends is the 44th section of the Companies Clauses Consolidation Act, the point being, whether a specific lien on the general effects of the company is thereby given. It will be observed that that section does not specify any particulars on which the lien is to attach; it says, generally, that the parties are entitled to be paid out of the tolls, property, or effects of the company. Now, of course, if the parties were to be paid at all, they must be paid out of the tolls, property, or effects of the company, for these were the only sources which could enable the payment to be made. It is, therefore, in effect, saying that the company are to pay out of their means. There must, I conceive, have been a reason for inserting this clause. And first of all as to the mortgage creditors. The mortgagees having had certain rights given to them by the 42d section, and the bond creditors having also had certain rights given to them, this 44th section, which applies to bond creditors, might have been intended, as it appears to me, rather to limit than to extend their remedies; for it might be intended to show that the bond creditors were not entitled to all the remedies which had been previously given to the mortgagees. Such might have been one of the objects for the insertion of the clause; but it must be construed in connection with the 36th section of the same act, and the two sections must be taken together. The 44th section says, "The respective obligees of the bonds shall be paid out of the tolls, or other property or effects of the company." The 36th section, which has a sort of preamble to it, to the effect that it is intended to apply to the general creditors of the company, is in these words: [His lordship read the section.] We have thus one clause stating that the bondholders are to be paid out of the tolls or other property or effects of the company; and another clause which says that creditors shall have the remedy of levying an execution against the property or effects of the company. These two sections are to stand together; but can they stand together, consistently with the 44th section, giving an equitable lien, which was intended to protect the estate, property, and effects of the company against other creditors? I do not apprehend that it can be said that the 36th section, which is applicable to the remedies of creditors generally, must not be extended to mean mortgagees and bond creditors. The act is framed in steps: first of all, it begins by the 36th section, as to the remedies of creditors generally, not at all referring or limiting its operation to any particular

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

class of creditors. Having dealt with the creditors of the concern generally, and given them a right to levy execution upon the property or effects of the company, also without limitation, (and if the argument on the part of the plaintiff be correct, there could be no property and effects of the company which could be properly amenable to an execution,) it then comes to the mortgagees and bond creditors, and it gives specific remedies to each of these classes of creditors. The meaning and intention, then, of the 44th section, I apprehend, was to prevent any argument that the rights and remedies of the bond creditors, therein referred to as having certain particular remedies, was limited to those remedies, and the effect of it was to show that the bond creditors were at liberty to pursue their legal or equitable remedies, if they had any, against the property or effects of the company, in common with all the general creditors of the company, as well as being entitled to any particular remedies which might be given to them in terms. Now, although it may not be very safe to argue upon any particular intent with reference to these clauses, yet, it is to be remarked, that a remedy given to the general creditors against the property and effects of the company is inconsistent with the whole property and effects being made subject to a specific equitable lien on the part of any particular class of creditors.

It is obvious, also, that these companies cannot be carried on without large credit being given; and if so, the legislature could never have intended to exclude the general body of creditors from all remedy for their debts, by giving a specific lien on the whole estate and effects of the company to a particular class of creditors. It is, however, said, that although there may be difficulty in contending, that while the property remains in the possession of the company, and is being used for the purposes of the company, it may be dealt with notwithstanding the lien, yet that effect may be given to the plaintiff's construction of the act, by allowing the bond creditors or the mortgage creditors, at any particular moment, to assert their rights, and that these rights may be inchoate or in suspense until they have asserted them. But what a fraud it would be upon the general creditors to allow the company to contract largely upon the possession and apparent ownership of property, and then to give to the mortgage or bond creditors the opportunity of asserting their lien, when probably the bond and mortgage creditors had allowed the company to obtain on credit the largest portion of their stock! Such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this, to a great extent, is. It appears to me also, when I look at the remedies, that none of the remedies which the act specifically provides are, for the reasons I shall state, at all applicable to the case supposed. One remedy is given by a receiver, and it is most material to attend to the manner in which that receiver is provided for. First, it will be observed that the receiver who is mentioned in the act, when obtained, is not to oust any other remedy, at law or in equity, which the mortgagees or bond creditors may have. They may proceed at law, and get execution; and that looks as if there was something

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

which was intended to be seized, independently of what the receiver was to take, namely, the tolls and sums of money, &c. Now, the execution could only be levied on the chattels, and thus the bond creditors and mortgage creditors have this great advantage over the general creditors, that they have a fund which the general creditors cannot take, namely, the tolls and sums of money, &c., and may take also in common with the general creditors by an action at law, if an action is maintainable, as to which I do not think it material to inquire. It does not, however, appear to me consistent with the fact of giving a receiver over the property for a particular purpose, that the property should be already subject to a lien on the part of the class of creditors to whom the several remedies are given. It is material to advert to the 54th section of the Companies Clauses Consolidation Act, which shows how the receiver is to be appointed by the justices, and points out what he is to do on being so appointed. In the first place, all the tolls and sums of money "shall be paid to, and received by, the person so to be appointed, and the money so to be received shall be so much money received by or to the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such receiver shall have been appointed; and after such interest and costs, or such principal, interest, and costs, shall have been so received, the power of such receiver shall cease." But it is said, that by the 33d section of the special act, which I shall come to presently, there is another receiver pointed at. Were there then to be two receivers—a chancery receiver and a justices' receiver? If there were, I certainly should have expected some regulation, some clause or section, by which to work out so anomalous a provision; but there is none. When, however, this 33d section is looked at in connection with the 53d and 54th sections of the Companies Clauses Consolidation Act, it will be seen that the only receiver which is contemplated is the justices' receiver.

Now, the claim set up, of a specific equitable lien, is so extraordinary, as connected with property of this nature, that it is most unreasonable to suppose that the right to it should be left to be inferred from a mere statement that payment was to be made out of the estate and effects of the company. It is not likely that the acts of Parliament by which these companies are constituted, and which are framed by the companies themselves, should be so prepared by them as to give the bondholder a lien on every spade or barrow which the company may possess. It would be a stigma on a company, inviting subscribers, and before any credit in fact existed, to insert a clause into their act depriving them of the power to contract on credit. It is material, however, to turn to what has been mainly relied upon, namely, the 32d section of the special act. The 32d section provides that the respective mortgagees and bond creditors shall be entitled to be paid out of "the tolls and other estate and effects of the company." The 44th section of the Companies Clauses Act says, "that the obligees of the bonds shall be entitled to be paid out of the tolls or other property or effects of the company." What difference is there between these two clauses? The one is merely a

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

reënactment of the other. The 32d section associates the mortgagees and bond creditors together; and, as to its operative part, directs that they are to be paid out of the tolls and other estate and effects of the company. The only difference is, that the "mortgagees" are added, and the word "estate" is substituted for the word "property," which is the term used in the 44th section of the Companies Clauses Act; and that is a difference which I do not think applicable to the present case. I think the effect is generally to declare that the rights of the mortgagees and bond creditors are not limited to the specific remedy of a receiver given to them in the Companies Clauses Act, but that they are also to stand as general creditors, entitled to all those remedies against the estate and effects of the company to which other creditors are entitled. It appears to me, therefore, that an effect is sought to be given to the 32d clause which is by no means justified.

Then comes the question with regard to the 33d section of the special act, which has relation to a receiver. It enacts, that it shall be lawful for the mortgagees and bond creditors to enforce payment by the appointment of a receiver, but not one word is said as to his duties, how he is to be appointed, how he is to be discharged, how long interest is to be in arrear, or what notice is to be given. The reason for this is obvious — that all these matters were contained in the 53d and 54th sections of the Companies Clauses Consolidation Act, and the clause in question does nothing more than supply certain blanks in those sections. These three sections, then, are to be taken as one and the same enactment. Now, the 33d section of the special act does not say how long interest is to be in arrear; (could it be intended that if it was one day in arrear the remedies would arise?) but the 53d section of the Companies Clauses Consolidation Act specifies thirty days. Then, again, the 33d section of the special act does not say how long the principal is to be due before the remedy shall accrue; but the 53d section of the Companies Clauses Act fixes the time at six months after the principal has become payable. So it is also to be observed, that in the 53d section there is no sum mentioned for warranting an application for the receiver. The words there used are, "if his debt amount to the prescribed sum," referring to the special act, where the sum is to be filled up in each case; and the 53d section of the special act here states it to be 25,000*l*. In short, taking any one of these sections abstractedly, it becomes quite useless. I therefore consider that the 33d section of the special act does no more than give to the mortgagees and bond creditors the benefit of the 53d and 54th sections of the Companies Clauses Act, filling up those blanks which are essential to give them effect. It thus seems to me that there is no ground for contending that this clause (the 33d of the special act) carries the remedy against the estate and effects of the company any further than was done by the previous clause, (the 32d.) Now, this bill is filed upon the equity of a supposed specific lien; and in the course of the argument it has been substantially, and I think in terms, shown, that if there was no such lien there was no foundation for the bill. It appears to me that it is quite inconsistent with the whole purview of the special act to

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

suppose any such specific lien was intended to be given, and that, therefore, this bill has no equity upon which the remedy sought could be founded; and that the order which was made ought not to have been made, and would not have been made, if, instead of being obtained by arrangement between the parties to the suit, the court had been made aware of all the circumstances. The court, at the time, was not aware that the receiver which was asked for was asked for with the view, or would have the effect, of interfering with the rights or remedies of other persons.

Under these circumstances, the question that remains is, What ought to be the effect of this opinion on the present application, and to what consequences will it lead? I dare say that the parties fully believed at the moment they were entitled to do that which they were doing; and I do not suppose that they intended to commit any fraud, or thought that they were doing more than running a race with another creditor, and that they were perfectly entitled to reach the goal first, if they could do so by legal means. They would, however, have acted with greater caution, considering that the question depended on the construction of these acts of Parliament, which hardly, I think, can be said by any one to be free from doubt, if they had stated the question to the court. The execution creditors say, if there is no equity disclosed in this bill, and if this order has been obtained, not upon the judgment of the court, but by the consent of the parties, and the court shall now be of opinion, that if the circumstances had been brought under its notice it would not have been granted, that an order so obtained ought not to be allowed to interfere with, and impede, their legal right. It is said, however, on the other side, that even supposing the petitioners to be right, still they ought not to have the relief they ask in the present shape. It is said that they ought to file a bill, or that they should be heard *pro interesse suo*. Although I am much impressed with the importance of forms to secure the due administration of justice, and to prevent that arbitrary course of decision for which the absence of form gives too much opportunity, and which those who are so anxious to dispense with all forms do not sufficiently appreciate and perceive, still I should never be desirous to adhere to form where the purposes of justice do not require it. Now, in the present case, there are no facts suggested as necessary to be ascertained by further inquiry, nor any materials required in order to enable the court to pronounce its judgment; and I therefore do not think that I interpose summarily or hastily in declaring that the order made ought not to stand in the way of the execution creditors. I say this because I have had full opportunity during the argument of considering the effect of the acts of Parliament and the different authorities, and because I do not believe any further or better materials can ever be presented to the court. I consider that the cases which have occurred warrant me in saying that this order ought not to be allowed to interfere, as I before stated, with the execution creditors. I think that the principles laid down in *Dixon v. Smith*, 1 Swanst. 457; *Evelyn v. Lewis*, 3 Hare, 472; *Drewry v. Thacker*, 3 Swanst. 529; *The Attorney General v. The*

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

Mayor of Coventry, 1 P. Wms. 306; and *Gooch v. Haworth*, 3 Beav. 428, entirely warrant me in saying that the case is now ripe for my decision between the parties. In the case of *Gooch v. Haworth*, 3 Beav. 428, it appears that a receiver was in possession for the benefit of the tenant for life; then there was an execution creditor, who petitioned to be at liberty to levy; and the court thought, that notwithstanding the existence of the receiver, who, though in possession as the officer of the court, was in possession for the benefit of a particular party, it was not consistent that that should be allowed to interfere with the prosecution of a legal remedy against that party. The principle of that case and the other cases to which I have referred is this: that where a court has granted a receiver, and where a writ of sequestration has issued, and in other cases where an application can be made which can bring distinctly before the court all the materials which the most lengthened and expensive inquiry can produce, it is the duty of the court at once to pronounce its opinion.

It appears to me that the present case is in that situation, and I therefore think, notwithstanding the existence of the order obtained under the circumstances I have mentioned, the execution creditors may be at liberty to levy their execution after the expiration of four weeks. Now, it is obvious that the execution creditors may do a great deal of mischief without a corresponding advantage to themselves: my judgment, also, may turn out to be erroneous. I therefore wish to protect the parties from the consequences of such an error, and not to inflict an irremediable mischief by a decision which, though not hasty, may be mistaken. I have, therefore, suggested that the order for bringing the property into the county should be continued for four weeks; and I do it with this view — that in the mean time the plaintiff or others may have the opportunity of applying to the court to stay the levying of the execution, upon an undertaking to pay the amount, if, upon the further order of the court, it shall be so directed. That will also give the opportunity of appealing, if the parties desire to do so, against the order I now make, and it will secure the petitioners, which is all I think I ought to do. I only let them levy because I do not see that I can render them secure, in the event of my opinion being correct, by any other mode; but if I can do so, after giving an opportunity of reversing the decision I now come to, that is the course I shall take, because I shall secure justice to them, without doing unnecessary injury to those whose interests are equally at stake. It appears to me, that that which I am suggesting cannot operate at all unjustly or oppressively upon those who may come under its influence, because, if the petitioners are allowed to levy on and sell the engines and other property of the company, the company and the mortgagee and bond creditors will sustain a loss; but if the receiver is allowed to remain in possession, the company can sustain no injury by undertaking to answer for the value, upon which value the parties can agree. I have passed by the arguments addressed to me founded on public policy and many other considerations, because, however cogent they may be, they are not arguments that can avail the petitioners, as

Russell v. The East Anglian Railway Company; *ex parte* Bowes.

giving them any right. At the same time, having considered the arguments and the acts of Parliament, I think it is well worthy the attention of the parties themselves to consider whether they can safely go on in their present course, and I think that the receiver ought to be well advised as to his position. I do not enter particularly into the reasons, because I think it might be attended with disadvantages, and might call the attention of some persons to the power of doing mischief, which is not to be wished. The parties will also have the opportunity of considering whether it is desirable to adopt the suggestion I submitted to them, of turning the questions raised into a special case. Supposing that to be done, my judgment may be entered upon the special case to the following effect: that is to say, that the estate and effects of the company were liable to be taken in execution by the petitioners; that the order for the receiver ought not to have been made; and that the execution creditors ought to be permitted to levy, notwithstanding that order.¹

The following was the form of the order as drawn up: His lordship, being of opinion that the petitioners ought to be at liberty to levy upon the goods and chattels of the defendants, the East Anglian Railway Company, the amount of the judgment recovered by them against the said company, as in the petition mentioned, notwithstanding the possession of the receiver appointed in this cause, doth order that the petitioners be at liberty to levy accordingly, under the writ of *fi. fa.* already issued, or to be issued upon the said judgment, unless the sum of 1400*l.* be paid into the bank to the credit of this cause within one week from the service of this order on the plaintiff's solicitors, in manner hereinafter directed. And it is ordered, that such sum, if paid into the bank, be placed to an account to be entitled "The Account of the Petitioners, John Bowes, William Hutt, Nicholas Wood, and Charles Mark Palmer." And it is ordered, that William Seppings, the receiver, appointed in this cause, be at liberty to pay the said sum of 1400*l.* into the bank, to be there placed to the credit of this cause to the said account. And for the purpose of allowing any of the parties an opportunity of appealing to the House of Lords against this order, if they shall be so advised, it is ordered, that the sum of 1400*l.* do remain in the bank as aforesaid, subject to the further order of this court; but, in the event of any of the parties being advised to appeal as aforesaid, such appeal is to be prosecuted without wilful delay. And it is ordered, that the plaintiff, William Russell, do pay to the petitioners, John Bowes, William Hutt, Nicholas Wood, and Charles Mark Palmer, their costs of this application; such costs to be taxed by the taxing master of this court in rotation, in case the parties differ about the same. This order to be without prejudice to all questions as to the parties by whom such costs, and also the costs of the several parties who have appeared upon this application, shall be ultimately borne and paid; and any of the parties are to be at liberty to apply to this court from time to time, as they shall be advised.

¹ An appeal from this decision was lodged, but it has since been withdrawn.

In re Hall's Charity, and The Act 52 Geo. 3, c. 101.

In re HALL'S CHARITY, and THE ACT 52 GEO. 3, c. 101.¹

January 30, April 15, and May 6, 1851.

Construction of Charity Deed — Jurisdiction under Sir Samuel Romilly's Act.

THIS petition was presented under Sir Samuel Romilly's Act, 52 Geo. 3, c. 101, by Thomas G. Curlter and Richard Temple, two justices of the peace acting for the county of Worcester. It stated that Edward Hall, by deed poll of feoffment, dated the 4th of March, in the eighteenth year of the reign of Queen Elizabeth, with livery of seizin, granted and enfeoffed to certain parties therein named, their heirs and assigns, certain hereditaments situate in or near Upton-on-Severn, in the said county of Worcester, to certain uses, expressed in Latin, and which, in English, were as follows: "To the use and behoof of the reparation of the parish church of Upton-upon-Severn, and to the use and behoof of the reparation of a bridge called Upton Bridge, and to the use and behoof of other things needful within the parish of Upton aforesaid, from time to time to be done at the discretion of the aforesaid co-feoffees, and their heirs, and of other the parishioners of Upton aforesaid, to be applied and distributed forever." That on the 10th of July, in the forty-second year of the reign of Queen Elizabeth, there was an inquisition taken, upon a commission issued upon the Statute of Charitable Uses, in which it was recited, that certain lands reputed to belong to the reparation of the bridge over the Severn at Upton, and the floodgates near the same, had been underlet, and that the rents of the premises had not been employed, as they ought to have been, in the reparation of the bridge, but bestowed by the inhabitants of the town of Upton to other uses and their pleasures; by reason whereof the bridge of late years had fallen down, and the whole county, in respect of the necessary use of the bridge, had reëdified the same, and been thereby charged to the value of 800*l.*; and it was ordered by the commissioners, that the feoffees, on any future demise of the lands, should not reserve any less rent than according to the highest value, and should also observe certain rules in granting demises, as therein mentioned; and that they should from time to time yearly employ and bestow all the rents, issues, and profits, by them to be received out of the premises, upon the reparation and amendment of the said bridge and floodgates, as occasion should require, and thereof, and of such surplusage thereof as should happen, if any should be, should yearly, at the Quarter Sessions to be holden for the county of Worcester at Michaelmas, yield a just and true account, in the sessions of the justices of the peace for the said county, to the end that the said good use might not thereafter be violated or broken, and should abide such order concerning the further employing of the

¹ 15 Jur. 940.

In re Hall's Charity, and The Act 52 Geo. 3, c. 101.

same surplusage to the said bridge and floodgates as by the said justices for the time being should be prescribed. That the lands mentioned in such inquisition were the charity estates comprised in the said deed of feoffment. The petition then stated certain indentures, dated the 1st and 2d of September, 1775, whereby the premises were conveyed to new trustees, upon trust to employ the issues and profits thereof for and towards the maintenance and reparation of Upton Bridge, and for and towards the maintenance and reparation of the body of the parish church of Upton, and for such other necessary and public uses within the parish of Upton as they, the new trustees, their heirs, or assigns, or the major part of them for the time being, should think proper. It also stated certain proceedings in chancery in 1816, under which certain leases of the charity estates were set aside, and new trustees appointed; and a subsequent appointment of new trustees of the charity estates in 1827, when they were conveyed upon the same trusts as were declared by the indentures of 1775. It then stated who were the present trustees, and that some small sums of money were from time to time, down to the year 1839, expended or allowed by the trustees, out of the income of the said charity, for the reparation of Upton Bridge; that since 1839, no part of the income had been so applied, but the whole, except a cash balance now in the hands of the trustees, had been applied by them in or towards the reparation or rebuilding of the parish church of Upton, or in or towards other purposes within the parish of Upton, exclusive of the reparation of the bridge; that the clear income of the charity estates was 90*l.* per annum, but the same would be considerably increased on the falling in of certain leases; that the bridge was in a dilapidated state, and a large sum was necessary to be laid out in repairing or rebuilding it; that the county of Worcester was bound to repair or rebuild the bridge, and to bear the expense, so far as it was not borne by the charity; and the petition prayed a declaration that the cash balance in the hands of the trustees, and one moiety of the income of the charity estates, and so much of the other moiety thereof as might not from time to time be needed for the reparation of the parish church of Upton, ought to be applied in or towards defraying or reimbursing to the county of Worcester, the expense of the necessary reparation or rebuilding of the bridge, and for a reference to the master to settle a scheme for the application of the income of the charity estates. It appeared that the trustees had applied the whole income for the repair of the parish church, because the county were liable to repair the bridge, and under a notion that the deed of trust gave them a discretionary power to do so. The petition came on before Lord Langdale, M. R.; but his lordship having expressed a doubt whether he had, upon petition under Sir Samuel Romilly's Act, jurisdiction to decide on the construction of the deed, although the parties agreed to take no objection on the ground of jurisdiction, the case stood over for the purpose of examining the authorities.

April 16. The case was now heard before Sir John Romilly, M. R.

In re Kirkpatrick's Trust, and The Act 4 & 5 Will. 4, c. 29.

Roupell and *Amphlett* appeared for the petitioners.

Lloyd and *E. Younge*, for the trustees.

On the question of jurisdiction the following cases were cited: *The Upton Warren Case*, 1 My. & K. 410. *Re The Shrewsbury Grammar School*, 1 Mac. & G. 324. *The West Retford Case*, 10 Sim. 101, 109. *Dean Clarke's Charities*, 8 Sim. 34. *The Corporation of Ludlow v. Greenhuse*, 1 Bligh, N. S. 17.

May 6. SIR JOHN ROMILLY, M. R., gave judgment. He was of opinion that the rents ought to be divided into three equal parts — one third part to be applied to the repair of the bridge, one third to the repair of the church, and the remaining third to useful purposes for the benefit of the parish, at the discretion of the trustees and the parishioners. If in any year either of the third parts was more than was sufficient for the purposes required, he directed that the surplus of such third should be invested and accumulated for the benefit of the object for which such third was intended. With regard to the jurisdiction of the court to decide the questions raised on petition under Sir Samuel Romilly's Act, he thought, having regard to the cases, and especially to that of *The Shrewsbury Grammar School*, that the court had such jurisdiction, and that an information was not necessary. The costs of all parties to be taxed as between solicitor and client, and paid out of the balance in the hands of the trustees; and, if necessary, out of the subsequent rents.

In re KIRKPATRICK'S TRUST, and THE ACT 4 & 5 WILL. 4, c. 29.

December 20 and 21, 1850.

Order of Reference — Ex parte Proceedings — Investment of Funds — Parties Interested.

An order of reference, under the 4 & 5 Will. 4, c. 29, as to whether it would be for the benefit of the parties beneficially interested in a settled fund to lend it on the security of freehold estates in Ireland, may be made *ex parte*; but the court will not confirm the master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, have either been served with the petition, or appeared before the master.

UNDER the trusts of a settlement, the sum of 30,000*l.* consols was held by trustees upon trust, in equal thirds, for three married ladies, for their separate use, and after their deaths for their respective children. The trustees were authorized to alter and vary the security of the trust fund, with the consent of the persons immediately interested, and to lay it out on real securities in England or Wales. There were infant children of the marriages. In August, 1850, an

In re Kirkpatrick's Trust, and The Act 4 & 5 Will. 4, c. 29.

order was made in this branch of the court, upon a petition presented by the trustees, by which a reference was directed to the master, to inquire and state whether it would be for the benefit of the parties interested in the fund that 20,000*l.*, part of it, should be lent to the mayor, aldermen, and burgesses of the borough of Limerick, on the security of the corporation estates. The master, by his report, found that the loan of that sum would be beneficial, and that the annual rental of the estates proposed as a security exceeded the sum of 4000*l.* A petition was now presented to confirm that report.

W. W. Cooper, for the petitioners, submitted that the words of the power of altering and varying the securities permitted the trustees to lay out money on real securities in England and Wales; and, therefore, under the provisions of the stat. 4 & 5 Will. 4, c. 29, money might be advanced on estates in Ireland. *Ex parte French*, 7 Sim. 510.

KNIGHT BRUCE, V. C., asked whether all the parties beneficially interested were served; and upon being answered that the persons entitled for life were served, but no others, he said that the order of August must have been on the assumption that all persons beneficially interested had been served. Here the parties who were interested for life were very naturally desirous of increasing their income, and they were satisfied with the security. Those, however, who would come after them, and perhaps even they themselves, might find themselves subjected to an Irish chancery suit, or an Irish ejectment. He would most certainly, if possible, avoid making any order sanctioning the removal of money from the English funds to real securities in Ireland.

December 21. *Kenyon Parker* and *J. J. Jervis*, on behalf of the trustees, renewed the application, citing and relying on the case of *Ex parte Lord William Pawlett*, 1 Ph. 570, where Lord Lyndhurst held, that, under this act, the order might be made *ex parte*.

W. W. Cooper appeared for the parties entitled for life, and supported the petition.

KNIGHT BRUCE, V. C., said he was quite satisfied that the view he took was the correct one; but he was not aware, until the case before Lord Lyndhurst was cited, that there was authority as well as principle to guide him. The lord chancellor in that case had certainly held, that the order of reference could be made *ex parte*; but his lordship went on to say that the parties beneficially interested, in the case of the death of Lord Harry Vane without issue, namely, Lord Sandwich, were to go in before the master. Now, Lord Lyndhurst considered, as his honor did, that the parties beneficially interested must have the opportunity of being heard. He should certainly not make the order. He would do all in his power to enable the parties to take the opinion of another judge, and would dismiss the petition

Ring v. Jarman.

if the parties so wished, though the inclination of his own opinion was, not to make any order at all.

Kenyon Parker said he would prefer to have the petition dismissed; and the same was ordered accordingly.¹

RING v. JARMAN.²

March 12, 1851.

Pleading — Parties — Next of Kin.

A testator gave his real estate to trustees, upon trust, to lay out the rents, during twenty-one years from his death, in the purchase of freehold or copyhold lands, and to convey them at the end of that time to the person then answering the description of the testator's heir. The personal estate was bequeathed to the same trustees, to lay out in land for the same purpose. In a suit, instituted shortly after the testator's death, by a person claiming to be the heir at law, for the administration of the testator's estate, it was held, that the next of kin were necessary parties.

THIS was a bill filed by the alleged heir at law of a testator, against the trustees and executors of the will, for the administration of the estate under the direction of the court. Richard Ring, by his will, dated the 25th of March, 1850, gave all his real estate to trustees, upon trust, during the term of twenty-one years from the testator's decease, to receive the rents and invest them in the purchase of freehold or copyhold lands in England or Wales; and after the expiration of twenty-one years, to convey the real estate so devised and to be purchased to the use of the person or persons who should then answer the description of the heir general of the testator. The testator also bequeathed his personal estate to the same trustees, upon trust, after payment of debts, &c., to lay out the same in the purchase of lands, to be conveyed as before directed as to the real estate; and he appointed the persons named as trustees his executors. John William Ring, the plaintiff in the suit, claimed to be the heir at law of the testator.

Giffard, for the plaintiff.

Malins, Toller, and Briggs, for the defendants.

KNIGHT BRUCE, V. C. I consider that the next of kin of the testator are proper to be made parties to this suit, as, in the event of there being no heir of the testator living at the end of twenty-one years, they will have an interest in the question. The cause must stand over, and I give the plaintiff liberty to amend the bill by making the next of kin parties.

¹ An appeal from the above decision was subsequently made to the lord chancellor, at his private residence, and the matter was fully brought before him; but he refused to make the order, saying that he saw no reason to differ from the view taken by the vice chancellor.

² 15 Jur. 942.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH:

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER;

DURING THE YEAR 1851.

DOE d. SHALLCROSS v. PALMER & others.¹

Easter Term, May 5, 1851.

Will — Interlineation — When presumed to be made — Evidence to rebut Presumption — Previous Declarations of Testator — Admissibility.

Where an alteration or interlineation appears upon the face of a will, the presumption is that it was made after the execution of the will, and it lies upon the party setting up the will to give some evidence to rebut that presumption.

A holograph will appeared to have been altered by turning a devise of certain cottages to W. F. in fee into a limitation to him for life, with remainder in fee to A. P., who was nowhere else mentioned in the will. Declarations made by the testator before the will was executed that he intended to make provision by his will for A. P., but not specifying any particular property which he intended to leave to her, were offered in evidence, for the purpose of raising an inference that the limitation to A. P. was inserted before the will was executed:—

Held, that these declarations were admissible evidence for that purpose.

Semle, that declarations made by a testator after the time when the will is executed that he had provided for a person whose name occurred on an interlineation would not, however, be evidence that the interlineation was made before execution.

EJECTMENT. The following is the statement of facts given by Lord Campbell, C. J., in delivering the judgment of the court:—

This was an ejectment to recover certain cottages and a garden, situate in the borough of Stafford.

At the trial, before me, at the Stafford Summer assizes, 1850, it appeared that the lessor of the plaintiff claimed as devisee of Francis

¹ 20 Law J. Rep. (N. S.) Q. B. 367. 15 Jur. 836.

Doe d. Shallcross v. Palmer & others.

take this, and keep it; and if it should be wanted, and I am not in the way, you will have it in your possession."

The defendants' counsel first contended that the presumption was, that the alteration in the devise of the premises in question had been made before the will was executed; but on the authority of *Cooper v. Beckett*, 4 Moore, P. C. C. 419, I held the contrary. The defendants' counsel then proposed to call witnesses to prove declarations of the testator, before the will was executed, that he intended to make provision by his will for Appollina Biddulph. This evidence was objected to; but I received it, subject to the opinion of the court upon its admissibility.

Dr. Knight, a physician at Stafford, was then called, and swore, in his examination in chief, that he knew Colonel Brookes well; that he had attended him professionally; that he was one of his executors; that he had heard him talk of his testamentary dispositions, and that he had frequently heard him say that he should make some provision for Appollina Biddulph, of whom he appeared to be very fond. In cross examination, the witness said that in the latter end of 1833, but he was indistinct as to the time, he applied to the testator for a loan of money for his brother Francis, when the testator said, "I cannot assist my brother; I have provided for his natural daughter."

Ann Lockby swore that many a time before the will was executed, in July, she had heard Colonel Brookes say, that, die when he might, he would leave Appollina two or three houses, and that he would leave the churchyard cottage to Mary Thornton, for her life, and afterwards to Ann Thornton, his own natural daughter, who was then at school.

Charles Passman, an attorney at Stafford, swore that he received instructions from Colonel Brookes, in 1830, to prepare a will for him, of which he produced a draft, containing a legacy to Appollina Biddulph of 500*l.*, payable at the age of twenty-one; the interest to be applied for her maintenance and support. There was a will engrossed from this draft, and executed. The testator was not then possessed of the property in question. He went to India immediately after, and remained there two years.

The defendants' counsel, likewise, contended that the appearance of the will afforded evidence that the alteration must have been made before it was executed, from the appearance of the folds, and of the ink upon it.¹ I said the jury might look at the will; and I left the question to them whether, from the evidence, they were satisfied that the alteration was made before the will was executed. The jury said, "We are satisfied the alteration was made before the will was executed."

I then directed a verdict to be entered for the defendants, with leave for the lessor of the plaintiff to move to enter a verdict for him,

¹ The will had been folded up and placed in an envelope, and part of the interlineation occurred upon a crease in the paper, which was relied upon as showing that those words must have been written before the testator had filled up the will and given it to Mary Thornton.

Doe d. Shallcross v. Palmer & others.

if the court should be of opinion that there was no admissible evidence to show that the alteration was made before the will was executed.

A rule *nisi* having been accordingly obtained, —

Keating and *Whitmore* showed cause.¹ First, the *onus* of proving that the alterations were made before execution was not properly cast upon the defendants. The learned judge acted upon the authority of *Cooper v. Beckett*; but that decision is not satisfactory. It is opposed to the prior authorities in the ecclesiastical courts; *In re Cross*, 1 Notes of Eccl. and Mar. Ca. 189; *In re Edwards*, 1 Notes of Eccl. and Mar. Ca. 401; and one of the members of the judicial committee, Vice Chancellor Knight Bruce, differed from the judgment, and Sir Herbert Jenner Fust did not coincide with the opinion there expressed when the case afterwards came before him. 4 Notes of Eccl. and Mar. Ca. 189. The observations of Dr. Lushington in *Burgoyne v. Shawler*, 1 Robert. 5, are not borne out by the 21st section of the Wills Act, 1 Vict. c. 26. *Larkins v. Larkins*, 3 Bos. & P. 16, does not support the proposition for which it is cited in *Cooper v. Beckett*. At all events, this court is not bound by that decision, and will look to the reasoning upon which it is founded. Blemishes appearing on the face of a deed are presumed to be made before execution. Best on Presumptions, p. 85. 1 Shep. Touchst. 53. *Trowel v. Castle*, 1 Keb. 21. See also *Doe d. Tatham v. Cattamore*, ante, Q. B. 364. There is no reason why a different rule should be applied to wills, where every intendment is to be made in support of the testator's intention. 1 Wms. Exec. 57; and *Bond v. Seawell*, 3 Burr. 1773. In *Hope v. Harman*, 11 Jur. 1097, the rule which throws upon the party producing the *onus* of proving that an alteration was made before execution is stated to be confined to negotiable instruments. But again, the lessor of the plaintiff relies upon the will in this case as much as the defendant; and the *onus* of proof of its validity ought to be thrown upon him, in order to establish his case. Under 3 & 4 Will. 4, c. 106, s. 3, the lessor of the plaintiff, although heir at law, must claim as devisee.

[*Lord Campbell*, C. J. *Quacunqve via*, the heir would be entitled, so the *onus* of establishing the will cannot be cast on him. You must prove that the estate is out of him. That act only applies where there is a valid devise to the heir.]

Then, independently of any declarations, there was evidence upon which the jury might find for the defendants, even supposing that *prima facie* the presumption is that the alterations were made after execution. The whole of the will was in the testator's handwriting; and the words of the alteration being written over a crease show clearly that they must have been inserted previously to its being folded up, and, therefore, go a long way to rebut such a presumption. *Knight v. Clements*, 8 Ad. & E. 215; s. c. 7 Law J. Rep. (N. S.) Q. B.

¹ January 29 and February 1, before LORD CAMPBELL, C. J., PATTESON, COLEBRIDGE, and WIGHTMAN, JJ.

Doe d. Shallcross v. Palmer & others.

144, will be relied on to show that the jury could not form an opinion from the inspection of the will; but no such point was there decided; all that was said was, that a mere conjecture raised by inspection is not evidence upon which they should act. Here there were other facts existing *dehors* the instrument itself upon which the jury might form an opinion.

[*Lord Campbell*, C. J. If the interlineation were in a different handwriting, they might probably draw an inference that it was not made at the same time as the will.]

The clause appointing executors is here interlined, and as it was proved that the testator had before made a will, it is highly improbable he should have executed this will without such a clause; and if one interlineation is made before execution, all may reasonably be inferred to be so. Suppose that Appollina Biddulph had been referred to in the latter part of the will as the said Appollina Biddulph, the conclusion would be irresistible that the testator had inserted the sentence in which she was first named before he wrote the latter part of the will. Again: supposing it had been proved that this will had been put upon a file immediately after it was executed, and upon inspection it appeared that the wire had passed through one of the interlined words, could it be doubted that this would be evidence that the interlineation was made before execution? It is sufficient if there was any evidence upon which a jury might legally act. If there was, they have by their verdict found it sufficient. In *Cooper v. Beckett*, the judicial committee of the Privy Council acted upon an inspection of the will, and determined the question upon that ground, as they were satisfied, from the fact of a circumflex appearing to be carried into the testator's name, that the witnesses who deposed to the alterations being made after execution were mistaken.

Lastly, the declarations received in evidence were properly admissible. There was no question here as to the testator's intention, the sole point to be ascertained being, whether a certain alteration took place before or after execution. In order to ascertain that fact, it is material to know whether such a person as Appollina Biddulph existed at the date of the will, what was her relation to the testator, and whether he was then aware of her existence, and of her relation to him. Therefore, his previous declaration that he intended to provide for her is evidence, not for the purpose of incorporating that intention in the will, but of excluding the probability that, subsequently to the time of his becoming acquainted with these facts, he had altered his will to meet them. If evidence had been given showing affirmatively that the testator never knew Appollina Biddulph, or that she had not been born until after the date of his will, it would have been conclusive against the defendants. Why, then, may not declarations leading to a contrary inference be evidence to rebut such a presumption? They show as a matter of fact that, prior to the execution of the will, an intention existed in his mind to benefit Appollina Biddulph, and that this intention did not first arise after that time. Wherever intention is part of the inquiry, prior declarations of intention are evidence of its existence. It is on this ground that previous

Doe d. Shallcross v. Palmer & others.

declarations of prisoners are evidence to prove or disprove malice in cases of homicide. If there were a draft of a will with these words in it, and it was shown that this will was in the first instance drawn up by mistake, that draft would be evidence of intention. 1 Jarman on Wills, 354. *Newburgh v. Newburgh*, 3 Madd. 364. *Hippesley v. Homer*, Turn. & R. 68. In *Kent v. Brooke*, 3 Moore, P. C. C. 334, it seems to have been assumed that an unsigned memorandum of alterations was sufficient evidence that they were made after attestation. There the sole question was as to the effect of the memorandum as evidence.

[*Lord Campbell*, C. J. You must go on and show a probability that the testator carried his preëxisting intention into effect.]

The first step is to show that such declarations are a legitimate mode of proving the fact of an intention in her favor; the second, that they raise a probability of his having done what he intended. As to this, it is contended that the probability of an act having been done derived from a preëxisting intention to do it is as properly a subject for the consideration of a jury as any other probability of a fact. If it is certain that a man has done one of two given acts, each of which is equally probable *per se*, there will be a greater probability that he has done that which he has previously expressed his intention of doing.

[*Wightman*, J. The question is as to the time of the alteration. Now, how does this evidence bear upon that? It is clear that, at some period, he had forgotten his previous intention.]

It is impossible to give positive evidence of the state of the will when he signed it, but it is more probable that he would not have completed it without carrying out his declared intention. The paper without the interlineation is entirely silent about the object of his declared intention; and this evidence does not go to show what the particular intention was, but to raise a probability that he carried out that intention, whatever it was. The knowledge and feelings of the testator towards the objects of his bounty are clearly material to this inquiry. Where the question arises, whether a will has been duly executed or not, the courts have acted upon probabilities. *Bond v. Seawell*, and *Best on Presumptions*. Wherever fraud or forgery is imputed, previous declarations of intention are admitted, because they raise a probability that the testator carried out his intention.

[*Coleridge*, J. There the presumption of fraud is excluded by the evidence.]

So, here, the suggestion that this addition was an afterthought is excluded.

[*Coleridge*, J. Would a direct assertion by the testator that he *had* made an interlineation in favor of Appollina Biddulph be evidence that he did so before execution?]

It would as against the lessor of the plaintiff, who claims under the testator.

[*Lord Campbell*, C. J. It would be difficult to distinguish such a subsequent declaration from a verbal statement that he had made a will in her favor.]

Doe d. Shallcross v. Palmer & others.

It is not necessary to argue whether the subsequent declarations were evidence, as there were others clearly prior. Probably, however, a subsequent declaration of intention would be admissible as showing that the previous intention continued to exist down to a period later than the date of the will.

Whateley and Phipson, in support of the rule.

[*Lord Campbell, C. J.* You need not trouble yourselves to support *Cooper v. Beckett*, as we all agree that the party relying upon an interlineation in a will must give some evidence of the time when it was made. The rest of the members of the judicial committee of the Privy Council were consulted as to that decision, and they all agreed in it.]

The question then is, whether there was any legitimate evidence given to rebut the presumption that the alterations were made after the will was executed. No doubt there are many cases where such declarations as were here tendered may be evidence; as, for instance, where the question is, whether the testator made a second will, or whether the will is a forgery, because there such declarations may be inconsistent with the existence of the will, or may negative the intent of that alleged to be forged. But upon this issue, which is on the independent fact, whether the testator did or did not sign his will with these alterations in it, such declarations are not admissible. It is a mere question as to time, and the declarations are not relevant to that inquiry. It is clear that any declarations by the testator to the effect that he *had* made his will would not be admissible. It would be hearsay evidence of a fact not included in any of the known exceptions.

[*Lord Campbell, C. J.* Except on the ground that declarations of a testator respecting property are evidence against all parties claiming under him.]

The lessor of the plaintiff, who is heir at law of the testator, does not claim under the will, and so cannot be bound by any declarations respecting the will. Suppose a testator declares that his will has been attested by two witnesses, that would not supply the want of an attestation. Or suppose a will made before 1838 were attested by only two witnesses, a declaration by the testator that he had executed it after 1838 would not be admissible. Here the question is, whether this alteration has been attested by two witnesses. Then, are the prior declarations of intention admissible upon this inquiry, which is not, whether there was an intention to benefit Appollina Biddulph when the declarations were made, but whether that intention was carried into effect before the testator signed his will? It is said the intention being shown to have once existed, it most probably continued, and that, therefore, these words must have been written before execution; but it is quite clear that the testator did not at all times preserve that preexpressed intention. That is shown by the will giving the premises to his brother before the alterations were made. He thereby contradicted his intention to give them to Appollina Biddulph.

Doe d. Shallcross v. Palmer & others.

[*Patteson*, J. The declarations only speak of a general intention to benefit Appollina Biddulph, and not of any particular property which he meant to leave her.

Lord Campbell, C. J. You assume that this was a perfect document before the alterations were made. It is possible that, still preserving his intention, he may, while drawing up the will, have casually omitted to carry it out; and when he came to the end, he discovered and remedied the defect.]

Such a possibility is too conjectural to be acted upon against the presumption sanctioned by *Cooper v. Beckett*. The question here is, whether these words form part of the will. Prior declarations of a testator have never been admitted in evidence as to the contents of a will. *Broome's Legal Maxims*, p. 260. *Wms. on Exec.* 290, 4th ed. *Doe v. Hiscocks*, 5 Mee. & W. 363; s. c. 9 Law J. Rep. (n. s.) Exch. 27. *Clayton v. Lord Nugent*, 13 Mee. & W. 200; s. c. 13 Law J. Rep. (n. s.) Exch. 363. *Thomas v. Thomas*, 6 Term Rep. 671. *Whitaker v. Tatham*, 7 Bing. 628; s. c. 9 Law J. Rep. C. P. 189. Neither is a draft of the will admissible for that purpose. *Miller v. Travers*, 8 Bing. 244; and *Newburgh v. Newburgh*.

[*Lord Campbell*, C. J. Those cases all refer to the construction of the devise, and the evidence was given to vary the language of the will.]

This is, in truth, a question of construction, viz., whether certain words are to be considered as forming part of the devise or not.

Lastly, it is said that, independently of these declarations, there is evidence to rebut the presumption that these alterations were made after the will was executed. As to the writing being on the crease, that is shown to be no reasonable evidence by *Knight v. Clements*.

[*Lord Campbell*, C. J. That case has been followed as to negotiable instruments; but it would be dangerous to apply the same doctrine to wills, where evidence of a similar kind has often been allowed for the purpose of showing the time of the execution.]

It is difficult to see any valid reason for applying a different rule to wills and to negotiable instruments. But, at all events, the evidence here relied upon is too slight and vague to afford any reasonable ground for an inference.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. [After stating the facts as before set out, his lordship proceeded.] After a long and very attentive consideration of the authorities and arguments on both sides, we have come to the conclusion that the verdict for the defendants rests on legitimate evidence, and that it ought not to be disturbed.

We agree that there is a presumption that the alteration was made after the will was executed; and, of course, this presumption must stand till some evidence is adduced to rebut it. We are not absolutely bound by the case of *Cooper v. Beckett*, as if it were a decision of the House of Lords, the tribunal to which an appeal lies in the last resort from the courts of common law; but we entirely approve

Doe d. Shallcross v. Palmer & others.

of that decision. We are not here called upon to give any opinion respecting an alteration apparent on the face of a deed or of a negotiable instrument; but having regard to the Statute of Frauds, and to the stat. 1 Vict. c. 26, respecting wills, we entertain no doubt that the *onus* is cast upon the party who seeks to derive an advantage from such an alteration in a will, to adduce some evidence from which the jury may infer that the alteration was made before the will was executed. Without this rule, there would be a dangerous facility given to a testator to alter a holograph will after its execution; all wills might be altered by spoliation; and the presumption contended for by the defendant is inconsistent with the 21st section of the Wills Act, which enacts, "That no alteration made in a will after the execution thereof shall be valid, unless the alteration be executed in like manner as is required for the execution of the will, with the exception that the signature and attestation may be in the margin instead of at the foot of the will."

We have to consider, therefore, whether, in this case, there was any admissible evidence to rebut the presumption. The evidence relied upon consisted of declarations by the testator frequently made before, and nearly down to, the time when the will was executed, that he intended to make provision by his will for Appollina Biddulph, (the now defendant Mrs. Palmer,) coupled with the fact, that without this alteration the will, which disposes of the whole of his property, real and personal, makes no provision for her. Are these declarations admissible evidence to rebut the presumption? or, in other words, ought the judge to have received this evidence, and to have told the jury that from this evidence they would be justified in inferring that the alteration had been made at the time when the will was executed, although they were not bound to do so?

It may be convenient, first, to consider the question, whether, if in a will which is not in the handwriting of the testator, an alteration appears, evidence might be received of previous declarations by him that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it, that before the will was executed the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ for this purpose from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will or the written instructions for the will, and the verbal declaration of the testator's intention, except as to the strength of the evidence which they respectively afford? As to admissibility, they all seem to rest on the same principle; and if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very credit-

Doe d. Shallcross v. Palmer & others.

able to the law if such evidence were to be excluded, as a logical inference might be fairly drawn from it respecting the priority of two events — the making of the alteration and the execution of the will; and I am not aware of any principle, rule of law, decided case or dictum against the admissibility of such evidence. I allow we cannot be guided alone by the consideration that both parties claim under the testator, for declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires; and for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible. But the previous declarations of the testator, as to his testamentary intentions, do not seem to be liable to the same objections. They demonstrate that the alteration is not an afterthought; they cannot have been uttered with any view of evading the law respecting the execution of wills; and they still leave upon the devisee the burden of proving, by reasonable evidence, that this law has been complied with.

There certainly is evidence which, in particular cases, would weigh with a reasonable man in forming a belief on a doubtful question, and which the law excludes; because, if generally admitted, it would more frequently mislead than guide to a just conclusion; but this evidence is not of that nature, for although it may vary very much with respect to the weight to be given to it, it seems liable to no greater objection than the declarations of the testator respecting his testamentary intentions where a will is impeached on the ground of incompetency or of fraud. If declarations of the testator are receivable to rebut the presumption respecting an alteration in a will in the handwriting of another person, is there to be a different rule as to a holograph will? There being a greater facility in altering such a will after its execution, the declarations may be entitled to less weight; but surely, if they are admitted with respect to the alteration of one class of wills, they cannot be excluded with respect to the other.

Although no decision can be quoted in which such evidence for rebutting this specific presumption has been admitted, no case has occurred in which it has been rejected; and in cases closely analogous, similar evidence has often been received. Declarations of the testator have been admitted to rebut the presumption that a legacy is satisfied by a provision in the lifetime of the testator, and to rebut the presumption as to an executor being entitled to the residue of the personal estate. Not only where the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admitted respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property. *Doe v. Allen*, 8 Term Rep. 137; and *Doe v. Hardy*, 1 Moo. & R. 525.

The case of *Bateman v. Pennington*, 3 Moore's P. C. C. 223, although not adverted to in the argument, appears entitled to great considera-

Doe d. Shallcross v. Palmer & others.

tion. The executors of Richard Sparling Berry, the testator having died suddenly, propounded for probate in the Prerogative Court of Canterbury two papers found in his *escritoire*. The first was a will written in ink, with the date, 5th of October, 1837, written in pencil in the third line, with the signature of the testator likewise written in pencil, and preceded by the following words, also written in pencil: "In case of accident, I sign this my will." This paper had a clause of attestation, but without the subscription of any witness. The other paper without date in the form of a will was subscribed by the testator in ink; this paper had a clause of attestation, without the subscription of any witness. The deceased at the time of his death was seized of real estates and possessed of personal property of great value, which were all disposed of by these testamentary papers.

Now, *prima facie*, these papers were not entitled to probate, the presumption being that they were only deliberative; and Sir Herbert Jenner rejected an allegation in support of them which relied chiefly upon the declaration in pencil—"In case of accident, I sign this my will." But upon appeal to the judicial committee this sentence was reversed, and the cause being there retained, probate was granted, although the date and signature, being in pencil, were presumptively deliberative, and the circumstance of the attestation clauses being unwitnessed afforded a strong presumption against the will, the court of appeal being influenced by the declaration of the deceased that he intended to die testate. Might not a similar declaration in writing by the deceased on another paper, or by word of mouth, have been admitted equally to rebut the presumption?

Almost all the cases cited on the part of the plaintiff were merely instances of the rejection of declarations of the testator where the question was upon the construction of ambiguous language used by him in his will. But this is not a case of patent ambiguity, or upon the meaning of words at all, the question being entirely one of fact upon the priority of two events, the making of the alteration and the execution of the will. It therefore much more nearly resembles the cases respecting the *factum* of the will, in which the declarations of the testator have been admitted.

The plaintiff's counsel relied much upon *Newburgh v. Newburgh*, where the testator having executed a will devising to his wife lands in the county of Sussex, it was proposed, with the view of making the will likewise carry to her lands in the county of Gloucester, to prove that the draft of the will prepared by the solicitor and settled by the conveyancer devised to the wife lands in the counties of Sussex and Gloucester, which the testator approved of, and desired to be copied for his execution, and that the stationer who copied it inadvertently left out "and Gloucester," changing *counties* into *county*. Sir John Leach, master of the rolls, and afterwards the House of Lords, according to the unanimous advice of all the judges, decided that the evidence was not admissible to enlarge the devise as it appeared on the face of the will. There can be no doubt as to the propriety of that decision, for the proposed addition would have been a new will, contrary to the Statute of Frauds. But in the present

Doe d. Shallcross v. Palmer & others.

case, the evidence admitted was to show that the devise under which the defendants claimed was part of the will, when it was duly executed.

The case of *Miller v. Travers* is equally well decided, and equally inapplicable. There the testator devised all his freehold estates in the county of Limerick and city of Limerick, having no estates in the county of Limerick, and a very small estate in the city of Limerick, but large estates in the county of Clare, which he intended to pass by his will, but did not mention. The devisee proposed to show by parol evidence that the estates in the county of Clare were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations, not affecting the estates in the county of Clare; that, by mistake, he erased county of *Clare*; and that the testator, after keeping the will by him for some time, executed it without advertg to this alteration. Lord Chancellor Brougham, by the advice of Lord Chief Justice Tindal and Lord Chief Baron Lyndhurst, most properly held that the proposed evidence was inadmissible.

The only other case cited worth mentioning was *Doe v. Hiscocks*. There, a testator devised lands to his son John Hiscocks for life, and on his decease to the testator's grandson John Hiscocks, eldest son of the said John Hiscocks, for life, and on his decease to the first son of the body of his said grandson John Hiscocks, in tail male, with remainder over. At the time of making the will, the testator's son John Hiscocks had been twice married; by his first wife he had one son, Simon; by his second, an eldest son John, and other younger children, sons and daughters. The question was, whether this John or Simon should take, neither of them answering fully the description given in the will. An ejectment being brought by Simon against John, it was proposed to offer in evidence the instructions given by the testator for his will, and also declarations made by him after its execution, to show that Simon was really the person in his contemplation as the object of his bounty at the time of making the will. This evidence was received, but the Court of Exchequer set aside a verdict founded upon it, being of opinion that, for the purpose of removing this ambiguity, the declarations of the testator ought not to be received as to what he intended to do in making his will. The object of the evidence was to assist in the construction of the will; and the real question was, whether this should be considered an instance of *latent* or *patent* ambiguity. The decision, therefore, whether right or wrong, is no authority in this case, where the question is totally different.

Upon the whole, there being no authority adverse to the defendants, analogous cases being in their favor, and the admission of the contested evidence appearing to us to be conducive to truth and justice, we are of opinion that it was rightly admitted. This is the only question which we have to determine. If the evidence was admissible, the weight to be given to it was a question for the jury.

But it may be proper to notice the argument much pressed at the bar, that the declarations in favor of Appollina Biddulph are completely outweighed by the subsequent deliberate intention which the

Doe d. Shallcross v. Palmer & others.

testator is supposed to have entertained to leave the premises in question in fee simple to his brother Francis. Although we should believe that the limitation of the premises, as at first framed, was by deliberation and not by mistake, this does not show that the testator had ever for one moment changed his intention to make a provision by his will for Appollina Biddulph. Here, the alteration consists in turning a devise in fee of certain cottages to Francis Brookes into a limitation to him for life, with a remainder in fee to Appollina Biddulph. If for a moment he intended that she should take no interest in those cottages, we must recollect the declarations proved were not that he meant to leave these specific cottages to her, only that he meant to provide for her by his will; and it might easily have happened that before he had finished the writing of his will, or upon reading it over before it was executed, he recollected that he had made no provision for her, and that he then introduced the alteration, with a view to keep the promise which he had often made. This seems much more probable than that he introduced the alteration after the will was executed, and before it was sealed up in the manner described, although it afterwards remained in his own custody. Not only may all be presumed to know the law upon the subject, but this testator himself had executed a prior will, and was acquainted with the solemnities required for a valid devise of real estate. There appears to be no ground for the conjecture that he might have altered the will after its execution, intending to have the will reattested and republished. He had an ample opportunity to have done so, if he had so intended. There seems every reason to believe that he sealed up the will immediately after its execution, and he certainly delivered it in a sealed packet a few weeks before his death to Mary Thornton, intending that it should remain in her custody till he should commit the fatal act which he then meditated.

We, therefore, think that the jury were fully justified in coming to the conclusion that the alteration was made before the will was executed. If the lessor of the plaintiff had proved that down to the execution of the will the testator did not know of the existence of Appollina Biddulph, or that he had expressed a purpose to exclude her from his will, an answer would have been given to the evidence offered by the defendants to rebut the presumption that the alteration was subsequent to the will; but the obliterated words showing that these premises had, at the first writing of this clause in the will, been limited in fee to Francis, afford a sufficient answer. It being quite certain that the testator intended that Appollina Biddulph should take the premises after the death of Francis, and the intention appearing to us to be testified according to the rules of law, we think that she ought to be allowed to remain in the possession of them, and that this rule to enter the verdict for the lessor of the plaintiff ought to be discharged.

Rule discharged.

Valpy & another, Assignees of Boydell & another, v. Oakeley.

VALPY & another, Assignees of BOYDELL & another, v.
OAKELEY.¹

Easter Term, May 2, 1851.

Contract — Damages, Measure of — Non-Delivery of Goods — Payment by Bill afterwards dishonored — Bankrupt.

A. contracted to deliver to B. certain quantities of iron, payment for which was to be by bills at specified dates, which were accepted by B., and dishonored at maturity. Afterwards B. became bankrupt, and his assignees sued A. for non-delivery of a portion of the iron:—

Held, that the assignees were entitled to recover only such damages as could have been recovered by B. at the time of his bankruptcy, namely, the difference between the contract and the market price of the iron.

Where, by a contract for delivery of goods, payment is to be made by bills which are dishonored before the goods are delivered, the parties are then placed in the same position as if the bills had never been given, or the contract had been to pay in ready money, and the vendee can recover only the difference between the contract price and market price of the goods.

ASSUMPSIT. The first count of the declaration was upon a contract, made before the bankruptcy, for the sale of 500 tons of pig iron by the defendant to the bankrupts, at 4*l.* per ton, to be delivered at Chester in parcels of 100, 200, and 200 tons, at the times in that count mentioned, and to be paid for by the bankrupts' accepting bills to be drawn by the defendant on them for the price of those parcels respectively. Breach, non-delivery of a portion of the iron.

Plea — Non assumpsit.

At the trial, before Cresswell, J., at the Chester Spring assizes, 1850, a verdict was taken for the plaintiffs for the damages laid in the declaration, subject to the opinion of the court upon a *case*, which stated that the bankrupts, previous to 1846, were owners of extensive iron works near Dudley, in the county of Worcester, and carried on business under the name of "The Oak Farm Iron Company," and the defendant was an ironmaster, having also extensive iron works in Flintshire. The case set out various letters containing the contract as alleged in the first count of the declaration, which appeared to have been made in July, 1847. The bankruptcy took place on the 11th of February, 1848. The defendant had sent to the bankrupts invoices of the three parcels of iron to be delivered under the contract; and, accompanying each invoice, the defendant sent to the bankrupts a bill drawn by the defendant on them for the price of the parcel mentioned in the invoice, which bills the bankrupts accepted and returned to the defendant before the bankruptcy. The bill for the price of the first parcel of 100 tons, which bore date the 2d of August, 1847, was duly paid at maturity. The other bills for 800*l.* each, dated respectively the 1st of September and the 1st of October, 1847, fell due before the bankruptcy, and were not paid. Previously to the bankruptcy, the defendant had indorsed one of these last-mentioned bills to the Royal Bank of Liverpool, who were

¹ 20 Law J. Rep. (n. s.) Q. B. 380.

Valpy & another, Assignees of Boydell & another, v. Oakley.

the holders thereof for value at the time of the bankruptcy, and who subsequently proved the amount under the fiat, but never received any dividend. The defendant was the holder of the other of these two bills at the time of the bankruptcy, and he subsequently proved the same under the fiat, but after the commencement of this action such proof was expunged by the commissioner on the application of the defendant. He never received any dividend. It was admitted by the defendant on the trial that there had been a deficiency of iron, to the extent of 185 tons 10 cwt.; but it was contended, on the part of the defendant, that there was not any such evidence as would support the special contract declared upon, and, even if that were proved, that the plaintiffs were only entitled to nominal damages. The plaintiffs, however, contended that there was sufficient evidence to warrant the jury in finding that the contract set out in the declaration was made, and that the plaintiffs, as assignees, were entitled to recover from the defendant the full price of the iron which had been withheld from the bankrupts. The question for the opinion of the court was, whether under the circumstances stated in the case the jury would have been warranted in finding that the contract set out in the declaration was made; and if the court should be of that opinion, and that the plaintiffs were entitled to judgment in the action, then a verdict was to be entered for the plaintiffs for such damages as the court should direct.

Hugh Hill, for the plaintiffs. The declaration is fully supported by the evidence. The only question of law is, what damages the plaintiffs are entitled to recover. And it is contended that they ought to be in the same position in this respect as if the action had been brought by the bankrupts the moment after the breach of contract; and it is admitted that there was a deficiency of 185 tons 10 cwt., while the bills were running. In that case, no set-off by reason of the bills not being paid could have been pleaded, and the bankrupts might have recovered the full value of what ought to have been delivered. If so, the assignees are entitled to stand in the same position. It is not found that there has been any alteration in the price of iron; therefore, the damages will be the price at the day when it ought to have been delivered. It is not the ultimate loss to the bankrupts' estate, but what the bankrupts might themselves have recovered, which is the criterion of damage. *Hill v. Smith*, 12 Mee. & W. 618; s. c. 13 Law J. Rep. (N. S.) Exch. 243. *Alder v. Keighley*, 15 Mee. & W. 117; s. c. 15 Law J. Rep. (N. S.) Exch. 100. This question arises on *non assumpsit*, not upon any plea of set-off or mutual credit, which, according to *Colson v. Welsh*, 1 Esp. 379, could not be set up as a defence to this action by the assignees for unliquidated damages.

Welsby, contra. There is no sufficient evidence shown upon the case to support the contract declared upon. Then, as to the measure of damages. Neither the doctrine laid down for the plaintiffs nor the cases cited are disputed, as there is no doubt that assignees take all the legal and equitable rights of the bankrupt, and amongst others

Valpy & another, Assignees of Boydell & another, v. Oakeley.

the right to recover damages for breach of contracts, which the bankrupt himself would have been entitled to recover at his bankruptcy. But, applying that principle here, the bankrupts would only have been entitled to recover nominal damages. At the time of the bankruptcy the bills had been dishonored, and the defendant, therefore, stood in the position of an unpaid vendor, in which case the measure of damages is the difference between the value at the time when the contract was made and the value at the time when it was broken. There was no evidence of any such difference in the present case. *Hill v. Smith* and *Alder v. Keighley* are very different from this case. The fact of the contract being for payment by bills does not affect the question, because, when the bills have turned out to be valueless, it is the same as if they had never been given. Giving a bill is only a *prima facie* payment; and if it has been dishonored at the time of the bankruptcy, the assignees are entitled to recover as from an unpaid vendor.

[*Patteson, J.* The bankrupts might have recovered full damages directly they discovered the non-delivery, but having waited until the bills were dishonored, they lost their remedy.]

To decide otherwise would be to enable the plaintiffs to recover on the dishonored bills. If the time of the breach is looked to, the acceptance of the bills by the defendant did not damnify the bankrupts or their assignees; for, if the bankrupts took up the bills, their assignees might recover the amount as paid upon a failure of consideration, because the goods were not delivered; and if the defendant had taken up the bills, he would have no remedy against the bankrupts or the assignees for the same reason. As, therefore, there is no actual damnification proved, the plaintiffs can only recover nominal damages for the breach of contract.

Hill, in reply. It is a fallacy to say that these parties are in the same position as if the bills had never been given. The contract was partially performed on the part of the bankrupt by giving the bills, one of which was paid. The two others, which were dishonored, were proved against the estate, but the proof was afterwards expunged. Still, the fact of their dishonor cannot be set up as a defence to the breach of contract. It was impossible to return the bills and put the parties *in statu quo*. It is admitted that the plaintiffs must recover nominal damages, yet that recovery could not be set up to an action upon the bills.

[*Wightman, J.* Suppose the bills had been dishonored while the rest of the iron was *in transitu*, could it have been stopped?]

It is difficult to say whether the equitable right of stopping *in transitu* would have applied or not; but that consideration will not determine this case.

LORD CAMPBELL, C. J. The plaintiffs are entitled to have the verdict entered for them upon *non assumpsit*. It is admitted that there is evidence to support the declaration, and we are at liberty to draw whatever conclusion a jury might have drawn; and we do so in

Valpy & another, Assignees of Boydell & another, v. Oakeley.

saying that the contract is proved. Then, as to the amount of damages. I find no fault with any of the cases cited; but consistently with them, and in accordance with what justice requires, we say that the damages should be merely nominal. We are to look to the time of the bankruptcy to ascertain the measure of damages. By the contract, payment was to be by bills, and while these bills were current they were payment, but as soon as they were dishonored the defendant was placed in the same position as if they had never been given at all. Now, if that had been the case, the purchaser clearly could only have recovered the difference between the contract price and the market price, but not the whole value of the goods. It is allowed that an unpaid vendor is only liable to that extent. Where payment is to be made by bill, and no bill is given, it is just the same thing as if payment was to be made in ready money. What, then, was the state of things between these parties at the time of the bankruptcy? The bills were then dishonored, and the parties were in the same position as if they had never been given at all or the contract had not been to pay by bills. If the bankrupts had sued them, they could only have recovered the difference between the contract price and the market price; and there being no such difference proved here, they could only have recovered nominal damages, and their assignees stand in the same position in this respect. This may be likened to a case where the vendor may stop *in transitu* if bills delivered as payment become dishonored before the *transitus* is completed.

PATTESON, J. It is conceded that there is a breach of contract; therefore, there must certainly be nominal damages recovered by the plaintiffs. The question is, whether they are entitled to recover the actual value of the goods not delivered. Now, as it is put, there being no difference proved between the contract price and the market price, only nominal damages can be recovered. The question is, whether the bills being dishonored are not just the same as if they had never been given at all in this action, which is for non-delivery of part of the goods. If the action had been brought while the bills were current it would have been a very different case, for the vendee would then have had a right to insist on the delivery of the goods. But all this occurred before the bankruptcy; and the assignees can only stand in the same position, as the bankrupts stood at the time of the bankruptcy, and the bankrupts themselves at that time could only have recovered nominal damages. The case cited from the Court of Exchequer did not arise between vendor and vendee, but money was remitted for a specific purpose, which was not performed. Instead of doing so, the defendants applied it in payment of another debt due to themselves, and it was held that they were bound to perform the contract into which they had entered, and the assignees were entitled to recover full damages only because the bankrupt himself could have done so.

WIGHTMAN, J. There was, no doubt, evidence to support this

 Gabriel & others v. Smith & others.

contract; and the only question is as to the amount of damages, whether they should be measured by the whole contract price of the iron, or whether they should be merely nominal. I see nothing to distinguish this from the ordinary case of lien of an unpaid vendor. As long as the bills were running, they may be taken to have been *prima facie* payment, but they were dishonored before the iron was delivered; and in that case, I have no doubt that the vendor's lien attaches, and that he may retain his goods until he is paid. Is there, then, any difference here shown between the contract price and the market price? for if any such difference exists, it is that which the vendee could recover. Now, no such difference appears in this case; and, therefore, the damages can be only nominal.

ERLE, J., concurred.

Judgment for the plaintiffs.

GABRIEL & others v. SMITH & others.¹

Easter Term, April 29, 1851.

Sale of Real Estate — Construction of Conditions of Sale — Covenant to produce — Deeds not in Vendor's Possession.

One of the conditions of sale, subject to which certain copyhold estates were purchased, stipulated that the vendors should not be required to produce any deeds, instruments, or documents of title not in their possession; and all deeds of covenant for production, and attested, official, or other copies, or extracts of or from any deed, will, &c., whether recited or referred to in the abstract or not, which the purchaser should, subject to this condition, require for verifying the abstract, or for any other purpose, and all certificates, &c., required to prove any descent, fact, matter, or thing whatsoever, also all searches and inquiries for the purpose of ascertaining where such instrument or evidence were to be found, and all costs and expenses incidental thereto, should be respectively paid, made, searched for and obtained by and at the expense of the purchaser requiring the same, and all expenses of examination and comparison of the abstract with the deeds, and of procuring the production of such deeds as the purchaser under this condition should have a right to require, should be exclusively borne and paid by the purchaser:—

Held, in an action to recover back the deposit paid upon the sale, that, under the above condition, the vendors were not bound to procure a covenant for the production of two deeds not in the possession of the vendor, but which were set out in the abstract of title delivered to the purchaser, and to which the vendors had procured access for the purpose of verifying the abstract.

INDEBITATUS ASSUMPSIT by the plaintiffs, as executors and executrix of Thomas Gabriel, deceased, against the defendants, to recover 346*l.*, alleged in one count to be money had and received to the use of the said testator, and in another count as received to the use of the plaintiffs as such executors and executrix. The defendants pleaded *non assumpserunt*; and issue having been joined thereon, the following case was, by the order of Coleridge, J., stated for the opinion of the court:—

¹ 20 LAW J. Rep. (N. S.) Q. B. 386.

 Gabriel & others v. Smith & others.

Case. The defendants are the devisees in trust and executors of the last will and testament of Simon Fallover, deceased, and on the 2d of August, 1848, they, by one Daniel Cronin, an auctioneer, caused certain copyhold premises holden of the manor of Fulham, in the county of Middlesex, the property of the said S. F., and mentioned in the accompanying particulars of sale,¹ to be put up to sale by public auction in lots, and the said T. G. was then declared the purchaser of that portion of the said premises which is comprised in, and described as, lots 2, 3, and 4 of the said particulars at and for several sums, amounting to the sum of 1730*l.*, under and subject to the several conditions of sale mentioned in, and appended to, the said particulars; and the said T. G. then, in pursuance of the said conditions of sale, paid into the hands of the said auctioneer the sum of 346*l.* as a deposit and in part payment of the said purchase money, and signed at the foot of the said particulars and conditions a contract for payment of the remainder of the purchase money. (A copy of the contract was set out.) The defendants, after the sale, delivered an abstract of their title to the solicitor of the plaintiffs, from which it appeared that the said S. F. derived his title under one Sir Elijah Impey, deceased, and that by a certain indenture, bearing date the 17th of February, 1768, and made between Sir J. Reade, Bart., of the first part, the said Sir E. I. (then E. I.) of the second part, Mary Reade, spinster, daughter of the said Sir J. R., of the third part, and John Dunning and Edmund Byron of the fourth part, (and being a settlement on the marriage of the said E. I. with the said M. R.,) after reciting, amongst other things, that the said E. I. had trans-

¹ The material conditions of sale were the following:—

6. That the recital or statement of any intestacy, descent, or other fact whatsoever, contained in any deed, or other instrument of assurance, dated twenty years ago, or upwards, shall in itself, and without further evidence or inquiry, be full and conclusive evidence of the intestacy, descent, or fact so recited or stated, and the vendors shall not be required to produce any deeds, instruments, or documents of title not in their possession, and all deeds of covenant for production, and attested, official, or other copies or extracts of or from any deed, will, act of Parliament, surrender, admittance, court roll, or other document or instrument, whether recited or referred to in the abstract or not, which the purchaser shall, subject to this condition, require for verifying the abstract or for any other purpose, and all certificates, copies of entries in registers, and other evidence, which may, or but for this condition might, be required to prove or establish any descent, fact, matter, or thing whatsoever, also all searches and inquiries for the purpose of ascertaining where such instrument or evidence are to be found, and all costs and expenses incidental thereto respectively, shall be respectively paid, made, searched for, and obtained by, and at the expense of, the purchaser requiring the same, and all expenses of the examination and comparison of the abstract with the deeds, and of procuring the production of such deeds as the purchaser, under this condition, will have a right to require, shall be exclusively borne and paid by the purchaser.

8. That such of the deeds in the possession of the vendors as relate to more than one of the lots hereby offered for sale shall be delivered to the largest purchaser of the same, to the greatest amount in value, or shall be retained by the said trustees, if the whole shall not be sold. And the purchaser to whom the deeds are delivered, or the trustees, in case of their retaining the said deeds, shall, at the expense of any other purchaser requiring the same, enter into the usual covenants with such other purchaser for the production thereof, but the purchaser or purchasers shall only require a deed of covenant from the vendors for the production of such deeds as are in their possession, and limited to the continuance of their possession thereof.

Gabriel & others v. Smith & others.

ferred the sum of 2000*l.* East India stock, with other moneys, into the names of the said J. D. and E. B., it was declared and agreed that the same was, amongst other funds, transferred into their names upon the trusts in the said indenture mentioned and declared, and in which said indenture was and is contained a power enabling the trustees of the said settlement to lay out the said trust moneys in the purchase of freehold lands in England, to be settled to the use of the said E. I. for life, with remainder to the use of the said M. R. for life, with remainder to the use of all the children of the said E. I. and the said M. R., and the heirs of their bodies lawfully issuing as tenants in common, with cross remainders between them in like manner, with ultimate remainders to the use of the said E. I. in fee; and in the same indenture was and is contained a declaration or proviso that if the said E. I. should settle and assure lands or tenements in fee simple, situate in England, or copyhold lands or hereditaments holden of the said manor of Fulham of the yearly value of 200*l.*, to the use of the said E. I. and M. R., and the children and issue between them two to be begotten, in such and the same manner as was thereinbefore directed to be limited of the lands and hereditaments thereinbefore authorized to be purchased, then the trusts therein declared concerning the said sum of 2000*l.* stock should cease, and such last-mentioned sum should be transferred into the name of the said E. I. for his own use absolutely; and in the said indenture is contained a power enabling the said E. I. and M. R. to appoint new trustees. The said E. B. afterwards died, leaving the said J. D. him surviving, and the said sum of 2000*l.*, together with the other stocks, thereupon became vested in the said J. D., who was afterwards created Baron Ashburton, and he subsequently died in August, 1783, having by a codicil to his last will appointed J. Banay, W. Radcliff, and J. Morris executors thereof during the minority of his infant son. Both the trustees named in the said settlement having thus died, by an indenture bearing date the 21st of February, 1785, and made between the said E. I., then Sir E. I., and the said Mary his wife of the first part, the said J. B., W. R., and J. M. of the second part, and Sir R. Sutton, Bart., T. Walker, and G. Rooke of the third part, the said Sir E. I. and M. his wife duly appointed the said Sir R. S., T. W., and G. R. to be trustees of the said settlement, and shortly after such appointment the said sum of 2000*l.*, with the other trust moneys, were transferred into the names of the said trustees. On or about the 22d of November, 1786, the said E. I., in pursuance and execution of the power vested in him, surrendered into the hands of the said manor of Fulham certain copyhold lands holden of the said manor of the yearly value of 200*l.*, (and of which the said lands comprised in the said lots 2, 3, and 4 in the particulars, and contracted to be purchased by the said T. G., were parcel,) to the use and behoof of the said Sir R. S., T. W., and G. R., their heirs and assigns, upon the several trusts, and to and for the intents and purposes, and subject to the limitations, powers, provisos, and agreements expressed and declared in and by the said indenture of settlement; and in or about the year 1812, the customary heir of the surviving trustee of the said settlement was duly admitted

Gabriel. & others v. Smith & others.

to the said copyhold hereditaments and premises upon the trusts of the said settlement. The said Sir E. I. died in the year 1809, leaving nine children, seven of whom were the children of his said marriage with the said Mary his wife, and the said Lady Impey died in 1820. On the 30th of June, 1823, the said seven children, or the heirs of such of them as were then dead, surrendered the said copyhold hereditaments to the use of J. West, his heirs and assigns, upon trust for sale, and he was thereupon admitted thereto, which surrender, by the custom of the manor, operated to bar the estates tail of the children of the said Sir E. I. in the said copyhold premises, with all remainders over. The said J. W., in pursuance of his powers and trusts for sale, sold on the 24th of June, 1825, and surrendered on the 25th of June, 1825, part of the said copyhold premises, including the said lots 2, 3, and 4, to Messrs. Douglas and H. Thompson. The said J. W. also on the same day sold and surrendered other parts of the said copyhold estates comprised in the said settlement to the said S. F., who upon that occasion took a covenant from the said J. W. to produce the prior deeds, but the said Messrs. D. and T. did not take any such covenant, but the surrender of the 30th of June, 1823, was delivered over to them by the said J. W. On the 3d of May, 1826, the said S. F. contracted with the said Messrs. D. and T. for the purchase of the said lots 2, 3, and 4, and they then entered into a covenant to produce the deed of the 30th of June, 1823, but the said S. F. had no covenant from the said Messrs. D. and T. to produce any other deeds. In January, 1827, the said lots were surrendered to the said S. F., who, on the 16th of April, 1827, was admitted thereto, and by his will, dated the 3d of February, 1831, devised the same to the said defendants in trust for sale. The said deed of settlement of the 17th of February, 1768, and the deed of the 21st of February, 1785, appointing the new trustees, were set out in the abstract of the vendor's title delivered by the defendants to the solicitor of the plaintiffs, but neither of those deeds was in the possession of the defendants, nor was any covenant for production of those deeds set out in their abstract of title. They, however, procured access to those deeds for examination of the abstract, but, upon being called upon to procure a covenant for their production to the plaintiffs in future, they alleged they were not bound to do so under the conditions; whereas the plaintiffs contend that there is nothing in the conditions which gave them notice that they were not to have such a covenant, and that such a covenant is absolutely necessary for the manifestation of their title in future. The plaintiffs then applied to the persons in whose custody the said indentures of the 17th of February, 1768, and the 21st of February, 1785, then were, and who were legally entitled to hold the same, for a covenant to produce the said two indentures, but such persons altogether refused to enter into such covenant; whereupon the plaintiffs gave notice to the defendants that the title to the said lots 2, 3, and 4 was unmarketable, and that they were not bound to accept the same or to complete the said purchase, and subsequently commenced an action against the said D. C., the auctioneer, to recover back the said sum of 346*l.*, the amount of the deposit paid by

Gabriel & others v. Smith & others.

their testator to the said auctioneer, on the ground that the vendors had failed in deducing a good title to the said premises. The said action having been commenced against the said D. C., he applied for relief under the Interpleader Act, and an order was thereupon duly made, by Coleridge, J., on the 7th of February, 1850, by which it was ordered that the said D. C. should pay into the court the said sum of 346*l.*, and that the said action as to him should be barred, and that this action should be tried between the plaintiffs and the defendants for money had and received, and that the question in the cause should be, whether the defendants had deduced a good title to the said lots 2, 3, and 4, according to the said conditions of sale, and that the costs of the auctioneer and all other costs should be reserved until after the trial; and this action has accordingly been prosecuted by the plaintiffs against the defendants, in compliance with the said order of Coleridge, J. It was agreed that the said particulars and conditions of sale, and also a copy of the said deed of the 17th of February, 1768, should for all purposes be taken and considered as parts of this case.

The question for the opinion of the court was, whether, under the conditions of sale, the vendors were bound to procure a covenant for the production of the said deeds of the 17th of February, 1768, and the 21st of February, 1785, or either of them; or whether, without such a covenant, they had not deduced a good title to the said premises, according to the conditions of sale. If the court should be of opinion that a good title had been deduced according to the conditions of sale, then the plaintiffs agreed that a judgment should and might be entered against them of *nolle prosequi*, immediately after the decision of this case, or otherwise as the court might think fit; but if the court should be of a contrary opinion, then the defendants agreed that judgment should be entered against them by confession for 346*l.* damages, immediately after the decision of this case, or otherwise as the court might think fit, and that judgment should be entered accordingly.

Cowling, (*Hance* with him,) for the plaintiffs. The material conditions of sale are the sixth and eighth, and under them the plaintiff is at least entitled to a covenant to produce the important deeds of 1768 and 1785. No muniment of title is secured to the plaintiff except the surrender by the children in 1823, and he has no evidence of title beyond that date. It is to be implied from the conditions of sale, first, that a good title for sixty years shall be shown. *Cooper v. Emery*, 1 Ph. Rep. 388; s. c. 13 Law J. Rep. (n. s.) Chanc. 275. Secondly, that every document material to the proof of that title shall be accessible for the purpose of verification. Sugd. V. & P., 11th ed., pp. 447, 452. Thirdly, the purchaser is entitled to all muniments of title in the vendor's control, and to attested copies of others at the vendor's expense, and to a covenant for the production of those not handed over, which shall be a covenant running with the land. Sugd. V. & P., 11th ed., pp. 381, 479. *Berry v. Young*, 2 Esp. 640, n.

[*Lord Campbell*, C. J. Who is to enter into the covenant which is to run with the land?]

Either West or Douglas and Thompson.

Gabriel & others v. Smith & others.

[*Lord Campbell*, C. J. They have ceased to have any estate in the land.]

Then that only makes the defect in the title more objectionable, and the vendors ought to have disclosed the true state of the title. The sixth condition implies clearly that a covenant to produce the deeds not in the vendor's possession is procurable, and no one upon reading it could suppose that he was not to have more than a twenty-five years' title.

[*Lord Campbell*, C. J. Such a covenant to produce as the purchaser requires is not legally procurable, and that must have been well known to the purchaser. The sixth condition expressly discloses that there were some documents not in the possession of the vendor.]

In *Osborne v. Harvey*, 12 Law J. Rep. (N. S.) Chanc. 66, where the terms of the conditions of sale were like the present, it was held that the vendor was bound to obtain for the vendee an inspection of deeds not in the vendor's possession. That the vendor here would procure the deeds for the purpose of verification, is clearly implied. There is nothing to lead the purchaser to suppose that he is not to have the ordinary covenants if the deeds were not forthcoming on the part of the vendor. He referred also to *Southby v. Hutt*, 2 Myl. & Cr. 207.

Peacock, (C. Clark with him,) contra. The real question is the true construction of the conditions of sale. The abstract of title shows a good title, and affords an opportunity for verification; and the conditions state that there are some deeds not in the vendor's possession; so that the vendor has done all that he could do. The case of *Osborne v. Harvey* is very different from the present. There was an express stipulation in that case of a good title for fifty years; and the decision simply is, that, under the particular conditions of sale, the purchaser was entitled to see that there were deeds establishing such title, and was not obliged to take the abstract of title for granted. To the same effect is the case of *Southby v. Hutt*. The point here is simply one of construction.

Cowling was heard in reply.

LORD CAMPBELL, C. J. I am of opinion that the defendants in this case are entitled to our judgment. I think the vendor has done all that can be required of him under the conditions of sale. It is admitted that a good legal title is made out by existing deeds, which were produced to the purchaser, and of which an abstract has been made; but still, if the conditions had been framed in the usual manner, it would have been right to say that the vendor had not done all that was required of him. When, however, we look at the sixth condition, it appears that the vendor has done all that could be required of him; for it shows that there are deeds not in the possession of the vendors, and there is a stipulation that they shall not be required to produce any deeds not in their possession, and an express

Gabriel & others v. Smith & others.

agreement that all deeds, covenants for production, and other documents should be obtained "by," as well as at the expense of the purchasers. No language could be more clear than that which is employed. As, therefore, the existing deeds were produced and the abstract verified, the vendor has done all that could be required of him. The purchaser took upon himself the risk of obtaining the deeds, or covenant to produce them from the persons who held them. The case is very different from *Osborne v. Harvey* and other similar cases, because there the stipulation related to the verification of the abstract of title, and it was most reasonable to hold that the purchaser should see the deeds from which the title was deduced; but there is nothing unreasonable in supposing that a purchaser takes upon himself the risk of the persons in possession of deeds either granting the deeds or giving a covenant to produce them.

PATTESON, J. The question turns entirely on the construction of the sixth condition and the meaning of the little word "by." That condition applies to documents over which the vendor had no control whatever, and as to those it is manifest the purchaser is to run the risk, as well as to be at the expense and trouble, of finding out where they are, and of obtaining covenants to produce them. Taking the whole condition together, it seems to me the word "by" must mean that as to all deeds not in the vendor's possession the purchaser must take the risk of getting a covenant to produce them as well as he can.

WIGHTMAN, J. The defendants have made out a good legal title, and the abstract has been verified by an actual examination, not only with the deeds in the vendor's possession, but with those in the possession of other persons. The only question is, whether the vendors are bound, under the sixth condition, to procure a covenant for the production of the deeds upon which the title rests. Nothing can be clearer than the terms of this condition; the meaning of which is, that the purchaser is to be at the risk, as well as the cost and trouble, of obtaining any covenant to produce what may be necessary.

ERLE, J. It is clear from the sixth condition that there were deeds requisite to the title outstanding in the hands of other persons; and the question is, Who is to get the covenant of the persons holding such deeds for the production of them? It is said that, under the sixth condition, the vendor is bound to obtain the consent of such persons to the execution of the covenant; but, looking to the terms of the condition, I gather clearly from it that the purchaser is to be at the risk of obtaining the consent of such persons, as well as the actual execution by them of the deed itself.

Judgment for the defendant.

Watkins v. The Great Northern Railway Company.

WATKINS v. THE GREAT NORTHERN RAILWAY COMPANY.¹

Easter Term, May 2, 1851.

Railway Company — Construction of Railways Clauses Act, 8 & 9 Vict. c. 20, s. 55 — Obstruction of Right of Way — Action in Respect of special Damage only.

Case, for the obstruction of a right of way as appurtenant to the messuage and dwelling-house of the plaintiff, by means whereof, as alleged in the second count of the declaration, the plaintiff could not have or enjoy his said way as he of right ought to have done, and otherwise might and would have done, and had been and was deprived of the use, benefit, and advantage of the same, to his damage.

Plea, justifying the obstruction complained of, for the purpose of making and constructing a railway under the powers and provisions in the Great Northern Railway Act, 1846, by which the defendants were incorporated, and in the acts therewith incorporated.

Replication, that the way was a road within the meaning of the Railways Clauses Consolidation Act, 1845, that the defendants had rendered it impassable, and thereby interfered with the same within the meaning of that act, and that the defendants had not caused a sufficient road to be made instead of the road so interfered with:—

Held, on demurrer, that by the 6th and 55th sections of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, the remedy by action for an interference with a private right of way was taken away, except where special damage had been suffered, and, therefore, that the second count was bad.

CASE. The first count of the declaration alleged that the plaintiff was in the possession and occupation of a certain messuage and dwelling-house with the appurtenances, as tenant thereof for a term of years, whereof divers, to wit, eighty years, were unexpired, by reason whereof the plaintiff, before and at the said several times when, &c., was entitled to the right of way hereinafter mentioned, over the road hereinafter alleged to have been interfered with, that is to say, that the plaintiff then had, and of right ought to have had, and still of right ought to have a certain way from and out of the said messuage and dwelling-house with the appurtenances unto, into, through, over, and along a certain other close and private way, in the county of Middlesex, to wit, in the parish of St. Mary, Islington, called and known as Almina Road, from, along, and out of the same unto and into a certain common public Queen's highway in the county aforesaid, and so back again from the last-mentioned highway unto, into, through, over, and along the said other close and private way last mentioned, and from thence unto and into the said messuage and dwelling-house with the appurtenances, for the plaintiff and his family and servants, occupiers of the same messuage and dwelling-house with the appurtenances, and for others, to go, return, pass and repass on foot and with horses, carts and other carriages, every year and at all times of the year, at his or their free will and pleasure as to the same messuage and dwelling-house with the appurtenances belonging and appertaining; that the said other close and private way called Almina Road abutted upon and led in a straight course from the said messuage and dwelling-

¹ 20 Law J. Rep. (N. S.) Q. B. 391.

Watkins v. The Great Northern Railway Company.

house with the appurtenances unto and into the said common public Queen's highway, and the plaintiff as such occupier as aforesaid of the said messuage and dwelling-house with the appurtenances had, by means of the said first-mentioned way or road called Almina Road, a direct, ready, and commodious way from the said messuage and dwelling-house with the appurtenances to the said common public Queen's highway, which same direct, ready, and commodious way and the use thereof to which the said plaintiff was so entitled as aforesaid was, before and at the said several times when, &c., of great value to the plaintiff, to wit, of the value of 500*l*. Yet the defendants, well knowing the premises, and wrongfully and maliciously contriving and intending to injure the plaintiff in his said occupation and interest of and in the said messuage and dwelling-house with the appurtenances, in the exercise of the powers by the Railways Clauses Consolidation Act, 1845, and the Great Northern Railway Act, 1846, granted, heretofore, to wit, on the 1st of January, A. D. 1849, and on divers other days and times, found it necessary to cross cut through a certain part of the said close and private way called Almina Road, and the same then was accordingly cross cut through and used by the defendants, so as to render it impassable for and dangerous and extraordinarily inconvenient to passengers and carriages, and to the plaintiff and other the persons entitled to the use thereof as aforesaid, without causing a sufficient road to be made instead of the road so interfered with, or any road whatever, contrary to law and the statute in that behalf, whereby the plaintiff, during the time aforesaid, then being the party entitled to the said right of way over the said road so interfered with by the company as aforesaid, that is to say, by the defendants, hath during the time aforesaid suffered special damage, by reason that the said company, to wit, the defendants, have during all the time aforesaid failed to cause another sufficient road to be made before they so interfered with such existing road as aforesaid, which special damage then amounted to a large sum of money, to wit, 500*l*., such special damage having arisen to the plaintiff not only by reason that the plaintiff by means of the premises was and is wholly deprived of the use of the said way called Almina Road, but also by reason that the plaintiff, his servants and family, occupiers of the said messuage and dwelling-house, have been and are with his and their carts, horses and carriages, obliged and compelled to go to and from the said messuage and dwelling-house with the appurtenances by a much more circuitous, inconvenient, and incommodious route than they but for the premises would have done, that is to say, by a way divers, to wit, 5000 yards longer than the way called Almina Road, and thereby the said messuage and dwelling-house with the appurtenances have become and are permanently lessened in value, to wit, to the amount of 500*l*.

The second count alleged that the plaintiff was, and thence hitherto hath been, and still is lawfully possessed of the said messuage and dwelling-house with the appurtenances in the first count mentioned, and by reason thereof the plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way, that

 Watkins v. The Great Northern Railway Company.

is to say, the way described in that count as to the said messuage and dwelling-house of the plaintiff with the appurtenances belonging and appertaining. Yet the defendants, well knowing the said last-mentioned premises, but wrongfully and unjustly intending to injure the plaintiff in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst the plaintiff was so possessed of the said last-mentioned messuage and dwelling-house with the appurtenances, and so entitled to the said way as aforesaid, to wit, on the 1st of January, A. D. 1848, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously stopped up and obstructed the said last-mentioned way, and the plaintiff by means thereof could not during the time aforesaid, nor can he have or enjoy his said last-mentioned way as he of right ought to have done, and otherwise might and would have done, and hath been and is deprived of the use, benefit, and advantage thereof, to the plaintiff's damage, &c.

The defendants pleaded, amongst other pleas,¹ to the second count, that they were a company incorporated by the Great Northern Railway Act, 1846, and the promoters of the undertaking therein mentioned, and that before and at the time of the passing of the said act of Parliament, certain plans and sections of the railway therein mentioned, showing the line and levels thereof, and also books of reference containing the names of the owners, lessees, and occupiers, or reputed owners, lessees, and occupiers, of the lands through which the same was intended to pass, had been and were deposited with the clerks of the peace of divers counties in England, and amongst others with the clerk of the peace for the county of Middlesex; that the said close in, over, and along which the said way in the said last count mentioned was so claimed as aforesaid, was in the line and upon the lands delineated on the said plans, and described in the said books of reference. Whereupon the defendants, afterwards, to wit, &c., for the purpose of making and constructing the said railway in the said act mentioned, under and by virtue of the powers and provisions in the said act and in the acts of Parliament therewith incorporated contained, entered upon the said last-mentioned close, and did then make and construct the said railway in, over, and across the same, and upon, over, and across the said way therein mentioned, doing as little damage as could be, as they lawfully might for the cause aforesaid, and did thereby necessarily stop up and obstruct the said way, which are the same several supposed grievances in the said last count mentioned, whereof the plaintiff hath above complained against the defendants. Verification.

Replication, that the said way in the last count and in the plea mentioned was and is a road within the true intent and meaning of the Railways Clauses Consolidation Act, 1845, and that the defendants in and by so entering upon such close in that plea mentioned, and in so making and constructing the said railway in, over, and

¹ The other pleas were, not guilty, and a traverse of the alleged right of way, *modo et forma*.

Watkins v. The Great Northern Railway Company.

across the same, and upon, over, and across the said way, rendered the same way impassable to all persons whomsoever, and thereby interfered with such way within the true intent and meaning of the aforesaid statute; and that the defendants did not at any time before they commenced such operations as aforesaid, or before they so constructed the said railway in, over, and across the said close and way, cause, nor have they hitherto caused, a sufficient road to be made instead of the road interfered with as aforesaid. Verification.

Demurrer to the replication. The material ground was, that under the 8 & 9 Vict. c. 20, the plaintiff's common-law right to sue was taken away, and that an action could only be maintained under the 55th section of that act in respect of *special damage*, occasioned by the obstruction complained of, and, therefore, that the second count of the declaration showed no cause of action, the remedy in other cases being by way of compensation under the 8 & 9 Vict. c. 20, and the Lands Clauses Consolidation Act.

Phipson, in support of the demurrer. Without an averment of special damage, as required by the 55th section¹ of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, no action for the alleged obstruction will lie, and, therefore, the second count is bad. The general purview of the act being looked to, it is clear that, consistently with the provisions in the other material sections here, namely, the 6th, 16th, 53d, 54th, and 57th, the company cannot be made liable unless special damage has been sustained. The general power of the company is given by the 16th section, and they might act under that power, subject only to the provisions in the 53d section, and their liability to be proceeded against for the penalty imposed by the 54th, and 57th sections. Any injury that might be sustained other than special damage, sect. 6, shows it was intended should form part of the compensation provided for by the Lands Clauses Consolidation Act. Where there is no special damage, the private right of action is impliedly taken away by the 55th section. The case of *The Queen v. Scott*, 3 Q. B. Rep. 543; s. c. 11 Law J. Rep. (N. S.) Q. B. 254, is distinguishable. That was the case of an indictment for a nuisance to a public road, and, therefore, rests on very different grounds from the case of a private way as here, in respect of which it was clearly the intention of the legislature that the company should not be hampered with individual actions.

Fortescue, contra. Where there is a wrong and a remedy created by an act of Parliament, that remedy, no doubt, must be pursued; but here, the remedy provided by the 55th section in case of special

¹ Which enacts, "If any party entitled to a right of way over any road so interfered with by the company shall suffer any special damage by reason that the company shall fail to cause another sufficient road to be made, before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company, with costs, by action on the case in any of the superior courts, and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same."

Watkins v. The Great Northern Railway Company.

damage is merely cumulative. It is necessary that there should be some obstruction occasioned by the act of the company; but when that is the case, there is enough to give a cause of action. The company are only empowered to make the road subject to the conditions imposed by the act.

[*Lord Campbell, C. J.* It is conceded that, but for the 55th section, the action might be maintained.]

There is here an existing common-law right of action, which cannot be taken away except by express words or necessary implication. Besides, it is not pretended that the company have complied with the conditions imposed upon them; and, although it may be said that the 55th section applies to a road insufficiently made, it cannot be taken to apply where the company have not even colorably complied with the provisions of the act.

Phipson, in reply, referred to *Crisp v. Bunbury*, 8 Bing, 394; s. c. 1 Law J. Rep. (N. S.) C. P. 112.

LORD CAMPBELL, C. J. I think in this case the defendants are entitled to our judgment. No doubt upon these pleadings it must be taken that the defendants have done wrong; but the question is, What is the remedy? Now, for this wrong the legislature has provided a special remedy in those sections of the 8 & 9 Vict. c. 20, which regulate the mode of proceeding to obtain compensation. But that remedy would only be cumulative, unless the statute confines the party to it. Looking, however, to the 55th section, it seems to me to indicate a clear intention that, unless special damage has been sustained, the remedy by means of compensation given by the statute is to be the only remedy. No other meaning than that can be given to the 55th section.

PATTESON, J. The distinction between this case and *The Queen v. Scott* is very obvious. That case was decided before the passing of the 8 & 9 Vict. c. 20, and rested entirely upon the provisions of the special act, which contained no remedy for the act complained of, and, therefore, the common-law remedy remained. But here the question is one of construction upon quite a different act. The 16th section gives the company the general power to divert or alter a road. The 53d section provides that, before the commencement of operations interfering with any road, the company shall cause another convenient road to be substituted. Then the 54th section imposes a penalty of 20*l.* for every day during which such substituted road shall not be made after the existing road shall have been interrupted, and then comes the section in question. Now, reading the three sections together, as we must do, I think it would be very strange to construe the 55th section in any other way than as ousting the common-law remedy by action, except in the instance of special damage provided for by that section. This being the true construction, the plaintiff has not brought himself within the act, and, therefore, cannot maintain the action.

Watkins v. The Great Northern Railway Company.

WIGHTMAN, J. There is no doubt of the plaintiff's right to compensation; but the question is, whether the right to sue at common law is taken away. It seems to me that, by necessary implication, that right is taken away by the act. If a right existed to maintain an action where there was no special damage, *a fortiori* the right would exist where the plaintiff had sustained special damage, and the provisions in the 55th section would be, therefore, unnecessary. But it is said that the section does not apply to a case where no road at all has been made; but it seems to me the section does not admit of that construction, and that, unless special damage has been sustained, the common-law right of action is taken away.

ERLE, J. I am of the same opinion. Sect. 6 of the 8 & 9 Vict. c. 20, provides for the making of full compensation to the owners of land required by the company in the exercise of their powers for the purposes of the particular railway, and all parties injuriously affected by the construction of the said railway. And then come these words, "except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act, for determining questions of compensation with regard to lands purchased or taken under the provisions thereof," &c.

Then here is an alleged wrong, arising out of the exercise of the powers given to the company; and the remedy provided for such a wrong is either to proceed for compensation in the manner pointed out by the act, or the company may be made liable to a penalty under the 54th section; or, in case of special damage, the party suffering such special damage may bring an action on the case against the company. In the present case, the second count of the declaration does not allege special damage. I am, therefore, of opinion that it cannot be supported. The general right of action seems to me to be taken away by the 6th section in express terms, and by necessary implication by the 55th section.

Judgment for the defendants.

Regina v. Isaacs.

REGINA v. ISAACS.¹

Bail Court, Easter Term, April 16, 1851.

Practice — Habeas Corpus to bring Prisoner before Justices — Charge of Felony — Application at Chambers.

An application for a *habeas corpus ad respondendum*, to take a prisoner, in custody on a charge of felony, before justices to answer to another charge of felony, must be made to a judge at chambers, and not to the court.

THIS was an application for a *habeas corpus ad respondendum* to the jailer of Lewes, to bring up the body of one John Isaacs, a prisoner, who was in the jailer's custody on a charge of felony, before the magistrates of the Horsham division of the county of Sussex, to answer to a charge of burglary alleged to have been committed by him at Uckfield, in the same county.

J. J. Johnston, in support of the application. The question is, whether the application may be made here in court or ought to have been made at chambers. In *Arch. Crim. Law*, 157, it is said, if a prisoner be in custody, and the facts show the necessity for the writ, "the court in term time will grant a rule, or a judge at chambers in vacation will grant his fiat, for the writ." According, therefore, to this text book, the application may be made in court. In *Gordon's Case*, 2 M. & S. 582, in which it was held that the application ought to be made at chambers, the writ was not issuable at common law, and the case turned entirely on the provisions of the stat. 43 Geo. 3, c. 140. That case had no reference to the taking a prisoner before justices at petty sessions; but the case recognizes the common-law power of the court.

COLERIDGE, J. I do not see why I should depart from the ordinary practice. The usual course is to apply for the *habeas* to a judge at chambers. The rule will be refused; but you may make your application to me at chambers this very day.

Rule refused.

¹ 20 Law J. Rep. (N. S.) Q. B. 395.
16 *

Fynney v. Beasley.

FYNNEY v. BEASLEY.¹

Easter Term, May 13, 1851.

Witness — 1 Will. 4, c. 22, s. 4 — Order for Examination of — Time of making.

The general rule is, that an order for the examination of a witness under 1 Will. 4, c. 22, s. 4, will not be made until after issue joined in the cause, but the practice in that respect is not imperative, and the rule may be relaxed where a case of urgent necessity is made out.

A writ of summons having issued in this action before an appearance had been entered, an order was made by Wightman, J., at chambers, for the examination of a witness who was on the point of sailing in two days for Port Natal.

A rule was afterwards obtained to rescind that order, on the ground that the judge had no power to make it before issue joined in the cause, on the authority of *Mondel v. Steele*, 8 Mee. & W. 300; s. c. 10 Law J. Rep. (N. S.) Exch. 314.

It appeared, from the affidavits in answer to the rule, that the plaintiff's cause of action was for goods sold and delivered and money paid, and that the witness was not likely to return from Port Natal for eighteen months.

Tomlinson now showed cause. No doubt, the ordinary practice is not to make such an order before issue joined; but there is no inflexible rule of practice which precludes a judge from doing so if he sees just reason for taking that course. In *Mondel v. Steele*, which is relied upon, the order was in fact made before issue, although the examination was not proceeded with until afterwards. If the rule can be departed from in any case it ought to be here, where it is quite plain from the affidavits what must ultimately be the issue, and where, therefore, it is quite unnecessary to wait until the defendant has pleaded; and unless this order is made at once, the plaintiff will be deprived of his evidence for at least eighteen months.

Willes, in support of the rule. The 1 Will. 4, c. 22, s. 4, is the only authority under which such an order as this can be made; and by sect. 7, any witness giving false evidence upon the examination may be indicted for perjury. The evidence, therefore, must be given at such a stage of the cause as will support an allegation of materiality to the issue joined between the parties.

[*Lord Campbell*, C. J. The question would be, whether the evidence were material at the time of the trial.]

The fact of perjury cannot be determined by reference to an issue joined at a future time.

[*Wightman*, J. Surely, in an action for work and labor, a commission may go before issue joined to inquire whether the work was done.]

¹ 20 Law J. Rep. (N. S.) Q. B. 395.

Fynney v. Beasley.

That is so, no doubt, in the case of a witness in India, according to *Spalding v. Mure*, 2 Tidd. Prac. 814, cited in *Mondel v. Steele*, and also in the Court of Chancery, where the practice is to issue a commission directly a bill is on the file. But the rule of practice is different in courts of law where the witness to be examined is in England, — *v. Brown*, Hardr. 315.

[*Lord Campbell*, C. J. A bill for a commission might be filed before issue is joined, and this statute was passed to give the courts at law the same power as a court of equity had.]

This being a point of pure practice, it is desirable for this court to adhere to the rule already laid down in *Mondel v. Steele*, until a remedy is provided by the legislature.

LORD CAMPBELL, C. J. I think there is nothing for the legislature to remedy. We have a power which we are to exercise according to a sound discretion. The stat. 1 Will. 4, c. 22, s. 4, enables the judges to order the examination of a witness "in every action depending" in the court; that is the only limitation imposed. There is no rule of court saying that a commission cannot be ordered until issue is joined, although the practice has no doubt been to that effect, and it is safe to abide by that practice where no extraordinary circumstances exist. But where, as occurs here, the purposes of justice would be defeated unless the order for the examination were to go at once, we ought to make it an exception to the ordinary practice. We have the analogy afforded by the practice in equity to guide us where, according to the high authority of Baron Rolfe, in *Mondel v. Steele*, a commission is granted before issue joined, and the statute was passed to obviate the necessity of going to a court of equity for a commission. I do not agree that there could be no indictment for perjury, where the examination of the witness has taken place before issue joined, if his evidence be material to the issue afterwards joined. Therefore, we ought not to set aside the order, leaving it open to the defendant to object at the trial to the admissibility of the deposition.

PATTESON, J. This decision must not be taken as an authority that parties may come, as a matter of course, for an order or commission to examine witnesses before issue is joined in a cause. I say this, because there is always a desire to push cases a little further than they quite warrant. The general rule remains as before laid down; the particular circumstances of this case make it an exception.

WIGHTMAN, J. This appeared to me to be a case of the greatest possible necessity. The only question was, whether I was precluded altogether from making the order. I find nothing in the statute to prevent me from making it. It does not appear that the rule is necessarily so inflexible that it cannot be relaxed in a case of great necessity, especially if we look to the analogy of courts of equity.

LORD CAMPBELL, C. J., added: I quite agree that the general rule must be taken to be as stated, and that it is only in cases of great necessity that it can be relaxed.

Rule discharged.

Jonas, Appellant; Adams, Respondent.

JONAS, Appellant; ADAMS, Respondent.¹

Easter Term, June 19, 1851.

County Court — Improper Reception of Evidence — Appeal in a Jury Case — Granting new Trial — Judgment for Defendant.

A plaint for breach of covenant was tried by a jury in a county court, and a verdict found for the plaintiff. An appeal was brought upon the ground that the judge had improperly received certain evidence. The court expressing an opinion that the evidence had been improperly received, application was made on the part of the defendant to have judgment entered for him. The court held that, under the stat. 13 & 14 Vict. c. 61, s. 14, they had no power to set aside the verdict of the jury, and to direct judgment to be entered for the defendant, and that they could do no more than direct a new trial.

THIS was an appeal from the County Court of Plymouth. The action was for breach of covenant. The case was tried by a jury, who gave a verdict for the plaintiff. The ground of appeal was, that evidence of a conversation, which took place at the time of executing the deed containing the covenant sued upon, had been improperly received.

Collier appeared for the appellant, the defendant in the county court; but the court called on

Greenwood, for the respondent, who contended that the evidence was admissible; that though it ought not to have been received for the purpose of varying the deed, yet that it might have been admissible, as bearing upon the breach of covenant.

[*Patteson*, J. It is quite clear from the case that the jury gave their verdict entirely on the supposed parol covenant attempted to be introduced by the evidence of the conversation. No rule of law is more clear than that evidence of conversations held previous to an agreement being reduced into writing are not admissible to vary the written contract. The evidence was, in this case, improperly received.]

Collier. It is submitted that the court will order judgment to be entered for the defendant under sect. 14 of the stat. 13 & 14 Vict. c. 61, which gives the appeal. The court of appeal "may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper."

PATTESON, J. It seems to me, that under this section, we have no power to set aside the verdict and direct judgment for the defendant. We can only grant a new trial. Our discretionary power contained in the last sentence applies only to the costs of the appeal.

¹ *Coram* PATTESON and WIGHTMAN, JJ. 20 Law J. Rep. (N. S.) Q. B. 397.

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

WIGHTMAN, J. Had the case been a decision by the judge of the county court alone, without the intervention of a jury, we might have directed judgment to be entered for the defendant. When there is a verdict of a jury, we can do no more than grant a new trial.

Appeal allowed; new trial granted.

REGINA v. THE POOR-LAW COMMISSIONERS; in re THE UNITED PARISHES OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY.¹

Hilary Vacation, February 22, 1851.

REGINA v. THE POOR-LAW COMMISSIONERS; in re THE VESTRY-MEN OF ST. JAMES, WESTMINSTER.¹

Trinity Term, June 17, 1851.

Poor Laws — Appointment of Officers — Regulations of Workhouse — Rescinding Regulations — Quashing Order.

An order of the poor-law board, directed to the directors of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, to the vestry-men of the said united parishes, and to the church-wardens and overseers of the poor of the said united parishes, contained, among others, the following regulations:—

Art. 1. The admission of paupers into the workhouse is to be by an order of the directors, or by an order signed by an overseer or assistant overseer.

Art. 2. No pauper is to be admitted under such order, if it bear date more than six days before he presents it at the workhouse.

Art. 13. The directors are not to admit into the workhouse, or any ward of it, or retain therein, a larger number or a different class of paupers than that from time to time fixed by the poor-law board.

Art. 25. The paupers are to be kept employed, and no pauper is to receive any compensation for his labor.

Art. 64. The directors are to superintend the repairs and alterations of the workhouse.

Art. 65. The government of the workhouse is to be exercised by them.

Art. 66. The vestry-men of the joint vestry shall, whenever it may be requisite, or whenever a vacancy may occur, appoint to certain offices named, and also "such assistants and servants as they or the directors, with the consent of the poor-law board, may deem necessary for the efficient performance of the duties of any of the said offices."

Art. 67. The officers are to perform such duties as may be required of them by the rules of the poor-law board, together with all such other duties, conformable with the nature of their offices, as the joint vestry or the directors may lawfully require them to perform. Provided that the regulations of this order shall apply to officers appointed by the joint vestry or the directors, although such officer may have been appointed before this order came into force.

Art. 83. Every officer appointed to or holding any office under this order, other than the medical officer of the workhouse, shall continue to hold the same until he die or resign, or be removed by the poor-law board, in conformity with the provisions of the law in that behalf.

Art. 88. The directors may, at their discretion, suspend from the discharge of his or her duties any master, matron, schoolmaster, schoolmistress, or medical officer; and shall, in case of every such suspension, forthwith report the same, together with the cause thereof, to the poor-law board.

¹ 15 Jur. 841.

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

The two united parishes were governed, as regards the relief of the poor, by a local act, 11 Geo. 4, c. 10. By sect. 51, the power of appointment, of suspension, and removal of the greater part of the officers named in art. 66, "together with such and so many other officers, agents, servants, and persons as they shall think proper," was placed in the vestry-men. The directors were a body whom, by sect. 63, the vestry-men were to elect annually; and, by sect. 72, they were to exercise all the powers relating to the relief, maintenance, and employment of the poor which church-wardens and overseers of the poor are by law authorized to exercise. By sect. 80, the directors were empowered to cause persons received into the workhouse to be employed in any work, trade, or manufacture, "and out of the profits arising from any work which may be performed by such persons, such gratuities or rewards may be distributed to the industrious and skilful, according to the quantity and perfection of their work, as to the said directors shall appear proper." On making absolute a rule for a *certiorari* to remove the above order:—

Held, first, that even in respect of those parts of the order which related to the appointment of officers, the order was rightly directed to the vestry-men.

Secondly, that arts. 66 and 88 substantially altered the machinery which the local act had erected for the administration of the law, by making the directors coördinate with the vestry-men in the appointment of officers, and by placing the whole discretion, as to suspension from the discharge of duties, in the first instance, with the directors; and, therefore, those articles were not within the power of the poor-law board. The poor-law board consented to rescind art. 65.

Thirdly, that sect. 46 of stat. 4 & 5 Will. 4, c. 76, which empowers the poor-law commissioners to order the parish officers to appoint such paid officers as the commissioners shall think necessary, and "to direct the mode of the appointment, and determine the continuance in office or dismissal of such officers," applied to parishes which were under a local act, and, therefore, rendered valid arts. 67 and 83.

Fourthly, that the other articles merely regulated or controlled the relief or management of the poor, or the government of the workhouse, or merely guided or controlled the vestry-men, and, therefore, within the powers given to the poor-law board by sect. 15 of stat. 4 & 5 Will. 4, c. 76, though some of them conflicted with the provisions of the local act.

After the rule for the *certiorari* was made absolute, but before the *certiorari* was served, the poor-law board issued an order rescinding so much of art. 66 as required the vestry to appoint such assistants and servants as the directors might deem necessary, and art. 88. A rule was subsequently obtained to quash the order:—

Held, first, that it was competent to the poor-law board to rescind the objectionable parts of the original order.

Secondly, that, the order being divisible, the court might quash part of it.

REGINA v. THE POOR-LAW COMMISSIONERS; in re THE UNITED PARISHES OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY.

Hilary Term, January 16, 1851.

PEACOCK moved for a *certiorari* to remove an order of the poor-law board or commissioners, dated the 21st of November, 1850, and addressed to the directors of the poor of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, in the county of Middlesex, to the vestry-men of the said united parishes, and to the church-wardens and overseers of the poor of the said united parishes. It appeared, from the affidavits, that the affairs of the joint parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, and of the separate parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, were regulated by stat. 11 Geo. 4, c. 10.¹ On the 21st of

¹ By the local act 11 Geo. 4, c. 10, a joint vestry is appointed for the management of the affairs of the two parishes, which were united for various purposes. The vestry make the poor rate, and expend it.

By sect. 51, the vestry-men of the said joint vestry may from time to time elect

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

November, 1850, the poor-law board issued the order in question for the government of the workhouse of the said united parishes; and on the 9th of December following, a notice of objections to the order, in pursuance of sect. 109 of stat. 4 & 5 Will. 4, c. 76, signed by T. D. Robinson, clerk to the vestry-men of the joint vestry of those parishes, was served upon the poor-law board. The parts of the order which were objected to were the following:—

“Admission of Paupers.”

“Art. 1. Every pauper who shall be admitted into the workhouse, either upon his first or any subsequent admission, shall be admitted in some one of the following modes only—that is to say,—

“By a written or printed order of the directors, signed by their clerk.

“By a written or printed order, signed by an overseer or assistant overseer of the parishes.

“By the master of the workhouse, (or, during his absence or inability to act, by the matron,) without any order, in any case of sudden or urgent necessity; provided, that the master may admit any pauper delivered at the workhouse under an order of removal

and appoint, (amongst other officers) “assistant overseers and beadles, together with such and so many other officers, agents, servants, and persons as they shall think proper,” and shall take security of the treasurers, collectors, or other receivers of money, for the faithful execution of their respective offices; and “may also from time to time suspend or remove any of the persons so elected or appointed, and appoint others in the place of those suspended or removed,” and shall order such salaries to be paid to such persons as they shall think proper; “and the several assistant overseers of the poor, who shall be appointed under the authority of this act, are hereby empowered to execute all such of the duties of the office of overseer of the poor as shall be directed by the vestry-men of the said joint vestry, in like manner, and as fully to all intents and purposes, as the same may be executed by law by any overseer of the poor.”

By sect. 58, the vestry-men of the said joint vestry shall annually nominate two inhabitant householders from each of the said parishes to be overseers of the poor of the said parishes respectively, to be appointed by the justices; and such persons shall execute all and every the powers and duties belonging to the office of overseer of the poor, except the power of making rates for the relief of the poor or for any other purposes, and except the powers given by that act to the vestry-men or to the directors of the poor. . . . “Provided always, that whenever an assistant overseer or overseers shall have been nominated and appointed as hereinbefore authorized, neither the church-wardens nor the said overseers shall interfere or intermeddle in or with the care, management, relieving, employment, or maintenance of the poor of the said parishes, in any case, except under the orders of the said vestry-men or of the directors of the poor; and all such overseers and assistant overseers as aforesaid shall severally and respectively, in the execution of the duties of their office, act in all things under the control and directions of the said vestry-men or the directors of the poor.”

By sect. 61, the vestry-men of the said joint vestry are empowered from time to time to make such rules and orders as to them shall seem right, for the election and good government of the directors of the poor, and of all officers, servants, and other persons employed under the said vestry-men or under the said directors in the execution of the act; and from time to time to alter or to repeal any such rules and orders, and to make others; . . . and such rules and orders shall be binding upon, and be observed by, all parties, and shall be sufficient in all courts of law or equity to justify all persons who shall act under the same; provided, &c.

By sect. 63, the vestry-men are required to elect annually twelve persons being

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

directed to the church-wardens and overseers of the said united parishes.

"Art. 2. No pauper shall be admitted under any written or printed order, as mentioned in article 1, if the same bear date more than six days before the pauper presents it at the workhouse.

"Art. 3. If a pauper be admitted by the master or matron without any order, the admission of such pauper shall be brought before the board of directors at their next ordinary meeting, who shall decide on the propriety of the pauper continuing in the workhouse, or otherwise, and make an order accordingly.

"Classification of the Paupers.

"Art. 13. The directors shall not admit into the workhouse, or any ward of the same, or retain therein, a larger number or a different class of paupers than that from time to time fixed by the poor-law board; and in case such number shall at any time be exceeded, the fact of such excess shall be forthwith reported to the poor-law board by the clerk.

"Art. 25. The paupers of the several classes shall be kept em-

vestry-men of the parish of St. Giles-in-the-Fields, and twelve persons being vestry-men of the parish of St. George, Bloomsbury, to be directors of the poor of the said parishes, who, by sect. 66, are required to put into execution the powers and authorities vested in them by virtue of the act.

By sect. 71, the property in the goods, chattels, furniture, and provisions, clothes, linen, and wearing apparel, tools, utensils, materials, and things whatsoever, furnished or provided for the use of the poor of the said parishes, and for carrying into execution the several other purposes of the act relating to such poor, is vested in the directors; and they may be sold and disposed of from time to time as they shall think proper, and the money arising by such sale or sales shall be applied in aid of the rates for the relief of the poor of the said parishes.

Sect. 72. "The directors for the time being of the poor of the parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, shall and may exercise all the powers and authorities relating to the relief, maintenance, and employment of the poor of the said parishes, which church-wardens and overseers of the poor, or guardians of the parish poor children, are, or shall be, by law authorized to exercise."

By sect. 74, the said directors are empowered to contract for making alterations and repairs in the workhouse "as the vestry-men of the said joint vestry shall direct," and for providing such furniture, goods, chattels, provisions, clothing, utensils, and materials as may be proper for clothing, maintaining, and employing the poor of the said parishes, to be received into the workhouse, &c.; and every such contract shall be entered in a book to be kept for that purpose by the said vestry clerk.

By sect. 77, all assistant overseers, constables, beadles, and other parish officers of the said joint vestry shall from time to time, and at all times hereafter, in the execution of their respective offices, aid and assist the said directors to the best of their power, and shall at all times obey their orders and directions in all matters relating to the relief, maintenance, and employment of the poor.

By sect. 80, "It shall be lawful for the said directors to cause any persons received into the workhouse of the said parishes to be employed in any work, trade, or manufacture, or otherwise, as they shall think proper, during the time he or she shall continue in such workhouse, (any law or usage to the contrary notwithstanding;) and out of the profits arising from any work which may be performed by such persons, such gratuities or rewards may be distributed to the industrious and skilful, according to the quantity and perfection of their work, as to the said directors shall appear proper, and the remainder of such profits shall be applied by the said directors in aid of the rate for the relief of the poor of the said parishes."

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

ployed according to their capacity and ability, and no pauper shall receive any compensation for his labor.

"Repairs and Alterations of the Workhouse."

"Art. 64. The directors shall cause the workhouse, and all its furniture and appurtenances, to be kept in good and substantial repair, and shall from time to time remedy, without delay, any such defect in the repair of the house, its drainage, warmth, or ventilation, or in the furniture or fixtures thereof, as may tend to injure the health of the inmates.

"Government of the Workhouse by the Directors."

"Art. 65. We do declare that, subject to the rules and regulations herein contained, the guidance, government, and control of the workhouse, and of the officers, servants, assistants, and paupers within such workhouse, shall be exercised by the said directors.

"Appointment of Officers."

"Art. 66. The vestry-men of the joint vestry shall, whenever it may be requisite, or whenever a vacancy may occur, appoint fit persons to hold the under-mentioned offices, and to perform the duties respectively assigned to them, viz.:—

- "1. Master of the workhouse.
- "2. Matron of the workhouse.
- "3. Chaplain.
- "4. Schoolmaster.
- "5. Schoolmistress.
- "6. Porter.
- "7. Medical officer for the workhouse.
- "8. Nurse.

"And also such assistants and servants as they or the directors, with the consent of the poor-law board, may deem necessary for the efficient performance of the duties of any of the said offices.

"Art. 67. The officers so appointed to or holding any of the said offices, as well as all persons temporarily discharging the duties of such offices, shall respectively perform such duties as may be required of them by the rules and regulations of the poor-law board in force at the time, together with all such other duties, conformable with the nature of their respective offices, as the joint vestry or the directors may lawfully require them to perform.

"Provided always, that every regulation applying to any officer holding his office under this order shall apply to any officer of the like denomination appointed by the joint vestry or the directors, although such officer may have been appointed before this order shall have come into force."

The 68th and 69th articles related to the mode of appointment, and the 77th and 79th articles to the remuneration, of the officers.

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

" Continuance in Office and Suspension of Officers. Supply of Vacancies.

" Art. 83. Every officer appointed to, or holding any office under, this order, other than the medical officer of the workhouse, shall continue to hold the same until he die or resign, or be removed by the poor-law board in conformity with the provisions of the law in that behalf, or be proved, in a manner satisfactory to the poor-law board, to be insane.

" Art. 87. Every medical officer duly appointed shall, unless the period for which he is appointed be entered on the minutes of the vestry at the time of making such appointment, or be acknowledged in writing by such medical officer, continue in office until he may die or resign, or become legally disqualified to hold such office, or be removed therefrom by the poor-law board.

" Art. 88. The directors may, at their discretion, suspend from the discharge of his or her duties any master, matron, schoolmaster, schoolmistress, or medical officer; and shall, in case of every such suspension, forthwith report the same, together with the cause thereof, to the poor-law board; and if the poor-law board remove the suspension of such officer, he or she shall forthwith resume the performance of his or her duties."

The 85th, 86th, and 90th articles were under the same title.

The notice of objections stated that the 1st, 2d, and 3d articles attempt improperly to limit, restrict, and control the powers and authorities given to the directors of the poor of the said united parishes, and to give improper powers and authorities to the overseers or assistant overseers of the said parishes. That the 13th article attempts improperly to limit, restrict, and control the powers and authorities given to the directors of the poor of the said united parishes. That the 25th article improperly orders that no pauper shall receive any compensation for his labor, and also thereby improperly attempts to limit, restrict and control the powers and authorities given to the directors of the poor of the said united parishes. That art. 64 attempts improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to, and vested in, the vestry-men and vestry of the said united parishes and of the said parishes respectively, and to add and transfer to the said directors powers and authorities to which they are not and cannot be entitled, and to add to the jurisdiction, powers, and authorities lawfully given to, and vested in, the said poor-law board and poor-law commissioners. That the 65th article attempts improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to, and vested in, the vestry-men and vestry of the said united parishes and of the said parishes respectively, over and relative to the said workhouse, and the officers, servants, assistants, and paupers within the same, as well as to give improper powers and authorities to the said directors. That the 66th article attempts improperly to take away, restrict, and control, in some respects, the jurisdiction, powers, and authorities given to, and vested

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

in, the vestry-men and vestry of the said united parishes and of the said parishes respectively, and in other respects to add to such jurisdiction, powers, and authorities; and that it also attempts improperly to take away, restrict, or control the power and authority given to and vested in the directors of the said parishes. That the 67th, 68th, 69th, 77th, and 79th articles attempt improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to and vested in the vestry-men and vestry of the said united parishes and of the said parishes respectively, and to add to the jurisdiction, powers, and authorities lawfully given to, and vested in, the said poor-law board and poor-law commissioners. That the 83d, 85th, 86th, 87th, 88th, and 90th articles attempt improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to, and vested in, the vestry-men and vestry of the said united parishes and of the said parishes respectively, and given to, and vested in, the said directors, and to add to the jurisdiction, powers, and authorities lawfully given to, and vested in, the said poor-law board and poor-law commissioners.

In Hilary term,¹ —

Sir A. J. E. Cockburn, S. G., Crompton, and Tomlinson showed cause. There are three principal objections to the order. The first is, that art. 66 directs the appointment of officers who, by art. 83, will be irremovable except by the poor-law board. The second objection is, that by art. 67, and the proviso thereto, the officers already existing become also irremovable, except by the poor-law board. The third objection is, that arts. 66 and 67 transfer to the directors powers which, under the local act, 11 Geo. 4, c. 10, properly belong to the vestry-men.

As to the first objection, by sect. 51 of stat. 11 Geo. 4, c. 10, the power to appoint, and suspend or remove, "assistant overseers and beadles, together with such and so many other officers, agents, servants, and persons as they shall think proper," is in the vestry-men. But the duties of the assistant overseers and other officers are performed under the control of the directors as well as of the vestry-men. The vestry-men may make laws in writing for their good government; the directors may direct them in many matters, and upon emergencies, with regard to the relief of the poor. [They referred to sects. 71, 77, and 80.] The 15th section of stat. 4 & 5 Will 4, c. 76, which empowers the poor-law commissioners to make orders "for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor, and for carrying this act into execution in all other respects as they shall think proper," is to be construed with the aid of the interpretation clause, sect. 109, by which "the word 'guardian' shall be construed to mean and include any visitor, governor, director, manager, acting guardian, vestry-man, or other officer in a parish or union appointed or entitled

¹ January 30, before LORD CAMPBELL, C. J., COLERIDGE and WIGHTMAN, JJ. PATTERSON, J., was at the sittings at Guildhall.

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

to act as a manager of the poor, and in the distribution or ordering of the relief to the poor from the poor rate, under any general or local act of Parliament." By sect. 21, the powers given by local acts relating to the building or management of workhouses shall be exercised under the control of the commissioners; and, by sect. 42, they are empowered to make rules, orders, and regulations to be observed in such workhouses. By sect. 46, the commissioners may direct the overseers or guardians of any parish or union to appoint such paid officers, with such qualifications as the commissioners shall think necessary, for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing, of accounts in such parish or union, and otherwise carrying the provisions of the act into execution. And the court has given full effect to the power conferred upon the commissioners by that clause. *Reg. v. The Poor-law Commissioners, (Allstonefield Incorporation,)* 11 Ad. & El. 558; 4 Jur. 335. *Reg. v. The Governors of the Poor of St. Andrew, Holborn,* 6 Q. B. 78. *Reg. v. The Governors of the Poor of Bristol,* 13 Jur. 809. *Reg. v. The Guardians of the Poor of Oxford,*¹ E. T. 1844; Just. of Peace, 710. *Ex*

1 REGINA v. THE GUARDIANS OF THE POOR WITHIN THE CITY OF OXFORD.
May 22, 1844.

RULE calling upon the guardians of the poor within the city of Oxford to show cause why a *mandamus* should not issue commanding them to appoint a master of the workhouse. It appeared from the affidavits on which the rule was obtained, that by sect. 27 of the 11 Geo. 3, c. 14, "An Act for better regulating the Poor within the City of Oxford," the guardians of the poor within the city of Oxford, (who by sect. 1 were incorporated by that name,) or any five or more of them, had power to appoint officers of the workhouse, and from time to time to remove and displace them as they should find cause, and pay such salary to them as they should think fit. On the 16th of August, 1843, the poor-law commissioners issued an order empowering the majority of the guardians to appoint, and directing that the appointment should be to hold during good behavior, and containing regulations the same as in the principal case. The guardians declined to act upon it, and the officers of the workhouse, including the master of the workhouse, having been previously appointed for one year, which expired on the 29th of September, 1843, they passed a resolution on the 21st of September, that the said officers should hold office during pleasure. The commissioners, treating the office of master of the workhouse as vacant at the expiration of the year of office, required the guardians to fill it, in conformity with their order, and, upon their declining to do so, the commissioners issued another order, requiring them to do so peremptorily.

Erie and *Thomas* showed cause, and contended, first, that there was no vacancy; and, secondly, that the poor-law commissioners had no authority to make the order of the 16th of August, 1843.

Sir F. Thesiger, S. G., (*Tomlinson* was with him,) contra, was not called upon.

LORD DENMAN, C. J. There was a vacancy at the end of the year of office, which could only be filled up in the manner directed by the order of the poor-law commissioners, if they had power to issue such an order; and I am of opinion that they had power to do so. The order does not attempt to alter the constitution of the board of guardians, but is only a regulation as to the mode in which the officers of the workhouse shall be appointed.

PATTERSON, J. I have no doubt that the poor-law commissioners have power to

Reg. v. The Poor-law Commissioners ; in re The U. P. of St. Giles-in-the-Fields, &c.

parte Teather, 1 Lownd. M. & P. 7. *Reg. v. The Poor-law Commissioners, in re Brighthelmston*, 3 Q. B. 325; 6 Jur. 989. The 46th section also gives to the poor-law commissioners an unlimited power to "determine the continuance in office or dismissal of such officers;" but by art. 84 they disclaim that power as to the inferior servants of the workhouse.¹ Therefore, under sect. 42, the poor-law commissioners may rescind the rules made by the vestry-men under sect. 51 of the local act, and may make new rules, and prevent the vestry-men from making new rules; and, by virtue of sect. 46, they may direct the appointment of such officers, with such continuance in office, as they think fit, dismissible only by themselves. Further, this power is essential to give full effect to their regulations, because they are to control every officer connected with the relief of the poor; and their regulations would be thwarted if they could not make the officers irremovable except by themselves.

As to the second objection, by sect. 42 of stat. 4 & 5 Will. 4, c. 76, the poor-law commissioners have power to alter or rescind the regulations of the vestry under sect. 51 of the local act; and under the other clauses they have power to substitute new regulations, and control the vestry-men in the exercise of their powers, and prohibit them from dismissing the existing officers.

issue this order under sect. 46 of stat. 4 & 5 Will. 4, c. 76. These guardians, under a local act, are not excluded from the superintendence of the poor-law commissioners. Then the order of the 16th of August, 1843, being a binding order, the resolution of the guardians on the 21st of September was nothing more nor less than an attempt to evade the effect of that order, and retain in their own hands the power of appointing the master of the workhouse in any way they might think fit.

WILLIAMS, J. It has been assumed, by Mr. Thomas, that this is an attempt made by the poor-law commissioners to interfere with the constitution of the board of guardians; but that is not so. The order is only a regulation as to the appointment to an office immediately connected with the administration of the poor, over which the poor-law commissioners have, under stat. 4 & 5 Will. 4, c. 76, immediate and direct authority.

COLERIDGE, J. Mr. Erle's argument was, that no vacancy had arisen, and that, therefore, the state of things contemplated by the order of the poor-law commissioners had not yet existed; but that is not so, unless the resolution of the guardians of the 21st of September is valid, which, he says, anticipated the vacancy which otherwise would have occurred on the 29th of September. I think the suggestion of the solicitor general, in the course of the argument, founded on sect. 22 of stat. 4 & 5 Will. 4, c. 76, is an answer. That resolution of the guardians was a rule, order, or regulation made under the authority of stat. 11 Geo. 3, c. 14, which is a local act relating to a workhouse or the relief of the poor, and therefore, by sect. 22 of stat. 4 & 5 Will. 4, c. 76, required the approval and confirmation of the poor-law commissioners to give it validity. Then, inasmuch as it never has been approved and confirmed, it is nugatory; and a vacancy in the office of master of the workhouse occurred on the 29th of September.

Rule absolute.

¹ Art. 84. "Provided always, that every porter, nurse, assistant, or servant may be dismissed by the vestry-men without the consent of the poor-law board; but every such dismissal, and the grounds thereof, shall be reported to the poor-law board."

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

As to the third objection, art. 66 leaves the power of appointment of officers in the vestry-men; but it also invites the directors to suggest the necessity of appointing "assistants and servants" to the other officers, because, having the management of the relief of the poor under sect. 72 of the local act, they are the best judges of emergencies. The consent of the poor-law board is to be given, and that will constitute an order to appoint paid officers under sect. 46 of stat. 4 & 5 Will. 4, c. 76. Art. 67 does not make any transfer of such duties as the vestry-men or directors may lawfully require, nor does it give the directors any new powers. [They referred to sects. 58, 71, and 72 of the local act.] Nor does it impose any duties but such as would be in compliance with stat. 4 & 5 Will. 4, c. 76. Art. 65 is only an enforcement of the provisions in the local act, by which the relief of the poor and government of the workhouse are vested in the directors; it continues the personal control which the directors have over the overseers and other subordinate officers by sect. 58 of the local act, subject to the rules, orders, and regulations of the poor-law board. The vestry-men could not personally interfere under the local act; they could only make rules and orders under sect. 61; and they may still do so, subject to the approbation of the poor-law board, under sect. 22 of stat. 4 & 5 Will. 4, c. 76. The effect of art. 88, which gives to the directors a power of suspending certain officers, requiring them to report the same to the poor-law commissioners, is only to place those officers under the control of the poor-law commissioners. The power of the vestry-men is restricted by that article, but only so far as the poor-law board are enabled to restrict it by stat. 4 & 5 Will. 4, c. 76. Arts. 1, 2, and 3 are authorized by sects. 15, 21, and 42 of stat. 4 & 5 Will. 4, c. 76. They do not remove the control of the vestry-men, nor do they give any fresh powers to the directors or overseers, but restrict the admission of paupers into the workhouse; the overseers and assistant overseers being already, by sect. 58 of the local act, subject to the orders of the directors; and the directors, by sect. 72 of the local act, having general powers relating to the relief, maintenance, and employment of the poor. Art. 13 is also authorized by sects. 15, 21, and 42 of stat. 4 & 5 Will. 4, c. 76.

Sir F. Kelly and Peacock, contra. First, all the parts of the order relating to the appointment of officers are bad, because the order is addressed to the vestry-men; whereas, by sect. 46 of stat. 4 & 5 Will. 4, c. 76, construed with the interpretation clause, sect. 109, it should be addressed to the directors.

[*Lord Campbell, C. J.* If it had been addressed to the directors, the objection would have been, that it superseded the powers of the vestry-men.

Coleridge, J. By sect. 109, the word "guardian" shall include "vestry-men."]

That meaning of the word is satisfied by reference to *Sturges Bourne's Act*, 59 Geo. 3, c. 12. The vestry is to act for the parish generally, and not merely for the purpose of the administration of

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

relief to the poor. [They referred to the meaning of the word "vestry" in sect. 109.] The vestry-men are not within sect. 46, though construed with sect. 109, because they do not order relief to poor persons. The orders of the poor-law board can only be made on one body of persons, who themselves act in the appointment of officers, and have the administration of relief to the poor. The statute did not contemplate a case where there were two bodies in existence.

[*Lord Campbell*, C. J. May not the vestry, for this purpose, have the management of the poor by the body whom they appoint?]

Secondly, the articles mentioned in the notice of objections are bad, for the reasons there stated. Art. 66 breaks in upon the constitution established by the local act in these united parishes for the management of the poor. It changes the constitution, giving legislative power to that which was the executive body, and executive power to that which was the legislative body. By sect. 15 of stat. 4 & 5 Will. 4, c. 76, the poor-law board are invested with power to control, direct, and assist the existing board in the administration of the poor law, and, therefore, they might direct the vestry-men to appoint certain officers; but they have no power to transfer the appointment of officers from one body to another, nor to change the law as to the appointment of officers. In *Rex v. The Poor-law Commissioners, in re St. Pancras*, 6 Ad. & El. 1, Coleridge, J., in his examination of stat. 4 & 5 Will. 4, c. 76, says of sect. 15, (p. 9,) "By this, although the administration of relief to the poor is made subject to their direction and control, yet that is still to be according to the existing laws, or such laws as shall be in force at the time being;" and he adds, (p. 10,) "Thus far, it cannot be doubted that the express object of the statute is to obtain an improvement and uniformity in the management of the poor, not by creating any new machinery in the parishes, but by preserving that which existed, whether under general or local acts, and submitting it to the guidance and control of the commissioners."

[*Lord Campbell*, C. J. I entirely concur with my learned brother in that view of the statute, unless power is specially given by it to the poor-law board to alter the local act.]

By sect. 51 of the local act, the exclusive power of appointing and removing officers is conferred upon the vestry-men. [They also referred to sect. 72.] Before the order, the officers held that office during the pleasure of the vestry-men; by virtue of art. 88, they would hold office during the pleasure of the poor-law board. The 46th section of stat. 4 & 5 Will. 4, c. 76, does not give to the poor-law board a power of removing officers; that power is given by sect. 48, in these terms: "To remove any master of any workhouse, or assistant overseer, or other paid officer of any parish or union, whom they shall deem unfit or incompetent to discharge the duties of any such office, or who shall at any time refuse or wilfully neglect to obey and carry into effect any of the rules, orders, regulations, or by-laws of the said commissioners." It is admitted, on behalf of the poor-law board, that they cannot take away the power of appointing; and the power

Jonas, Appellant; Adams, Respondent.

JONAS, Appellant; ADAMS, Respondent.¹

Easter Term, June 19, 1851.

County Court — Improper Reception of Evidence — Appeal in a Jury Case — Granting new Trial — Judgment for Defendant.

A plaint for breach of covenant was tried by a jury in a county court, and a verdict found for the plaintiff. An appeal was brought upon the ground that the judge had improperly received certain evidence. The court expressing an opinion that the evidence had been improperly received, application was made on the part of the defendant to have judgment entered for him. The court held that, under the stat. 13 & 14 Vict. c. 61, s. 14, they had no power to set aside the verdict of the jury, and to direct judgment to be entered for the defendant, and that they could do no more than direct a new trial.

THIS was an appeal from the County Court of Plymouth. The action was for breach of covenant. The case was tried by a jury, who gave a verdict for the plaintiff. The ground of appeal was, that evidence of a conversation, which took place at the time of executing the deed containing the covenant sued upon, had been improperly received.

Collier appeared for the appellant, the defendant in the county court; but the court called on

Greenwood, for the respondent, who contended that the evidence was admissible; that though it ought not to have been received for the purpose of varying the deed, yet that it might have been admissible, as bearing upon the breach of covenant.

[*Patteson, J.* It is quite clear from the case that the jury gave their verdict entirely on the supposed parol covenant attempted to be introduced by the evidence of the conversation. No rule of law is more clear than that evidence of conversations held previous to an agreement being reduced into writing are not admissible to vary the written contract. The evidence was, in this case, improperly received.]

Collier. It is submitted that the court will order judgment to be entered for the defendant under sect. 14 of the stat. 13 & 14 Vict. c. 61, which gives the appeal. The court of appeal "may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper."

PATTESON, J. It seems to me, that under this section, we have no power to set aside the verdict and direct judgment for the defendant. We can only grant a new trial. Our discretionary power contained in the last sentence applies only to the costs of the appeal.

¹ *Coram PATTESON and WIGHTMAN, JJ.* 20 LAW J. Rep. (N. S.) Q. B. 397.

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

WIGHTMAN, J. Had the case been a decision by the judge of the county court alone, without the intervention of a jury, we might have directed judgment to be entered for the defendant. When there is a verdict of a jury, we can do no more than grant a new trial.

Appeal allowed; new trial granted.

REGINA v. THE POOR-LAW COMMISSIONERS; in re THE UNITED PARISHES OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY.¹

Hilary Vacation, February 22, 1851.

REGINA v. THE POOR-LAW COMMISSIONERS; in re THE VESTRY-MEN OF ST. JAMES, WESTMINSTER.¹

Trinity Term, June 17, 1851.

Poor Laws — Appointment of Officers — Regulations of Workhouse — Rescinding Regulations — Quashing Order.

An order of the poor-law board, directed to the directors of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, to the vestry-men of the said united parishes, and to the church-wardens and overseers of the poor of the said united parishes, contained, among others, the following regulations:—

- Art. 1. The admission of paupers into the workhouse is to be by an order of the directors, or by an order signed by an overseer or assistant overseer.
- Art. 2. No pauper is to be admitted under such order, if it bear date more than six days before he presents it at the workhouse.
- Art. 13. The directors are not to admit into the workhouse, or any ward of it, or retain therein, a larger number or a different class of paupers than that from time to time fixed by the poor-law board.
- Art. 25. The paupers are to be kept employed, and no pauper is to receive any compensation for his labor.
- Art. 64. The directors are to superintend the repairs and alterations of the workhouse.
- Art. 65. The government of the workhouse is to be exercised by them.
- Art. 66. The vestry-men of the joint vestry shall, whenever it may be requisite, or whenever a vacancy may occur, appoint to certain offices named, and also "such assistants and servants as they or the directors, with the consent of the poor-law board, may deem necessary for the efficient performance of the duties of any of the said offices."
- Art. 67. The officers are to perform such duties as may be required of them by the rules of the poor-law board, together with all such other duties, conformable with the nature of their offices, as the joint vestry or the directors may lawfully require them to perform. Provided that the regulations of this order shall apply to officers appointed by the joint vestry or the directors, although such officer may have been appointed before this order came into force.
- Art. 83. Every officer appointed to or holding any office under this order, other than the medical officer of the workhouse, shall continue to hold the same until he die or resign, or be removed by the poor-law board, in conformity with the provisions of the law in that behalf.
- Art. 88. The directors may, at their discretion, suspend from the discharge of his or her duties any master, matron, schoolmaster, schoolmistress, or medical officer; and shall, in case of every such suspension, forthwith report the same, together with the cause thereof, to the poor-law board.

¹ 15 Jur. 841.

Reg. v. The Poor-law Commissioners; *in re* The U. P. of St. Giles-in-the-Fields, &c.

The two united parishes were governed, as regards the relief of the poor, by a local act, 11 Geo. 4, c. 10. By sect. 51, the power of appointment, of suspension, and removal of the greater part of the officers named in art. 66, "together with such and so many other officers, agents, servants, and persons as they shall think proper," was placed in the vestry-men. The directors were a body whom, by sect. 63, the vestry-men were to elect annually; and, by sect. 72, they were to exercise all the powers relating to the relief, maintenance, and employment of the poor which church-wardens and overseers of the poor are by law authorized to exercise. By sect. 80, the directors were empowered to cause persons received into the workhouse to be employed in any work, trade, or manufacture, "and out of the profits arising from any work which may be performed by such persons, such gratuities or rewards may be distributed to the industrious and skilful, according to the quantity and perfection of their work, as to the said directors shall appear proper." On making absolute a rule for a *certiorari* to remove the above order:—

Held, first, that even in respect of those parts of the order which related to the appointment of officers, the order was rightly directed to the vestry-men.

Secondly, that arts. 66 and 88 substantially altered the machinery which the local act had erected for the administration of the law, by making the directors coördinate with the vestry-men in the appointment of officers, and by placing the whole discretion, as to suspension from the discharge of duties, in the first instance, with the directors; and, therefore, those articles were not within the power of the poor-law board. The poor-law board consented to rescind art. 65.

Thirdly, that sect. 46 of stat. 4 & 5 Will. 4, c. 76, which empowers the poor-law commissioners to order the parish officers to appoint such paid officers as the commissioners shall think necessary, and "to direct the mode of the appointment, and determine the continuance in office or dismissal of such officers," applied to parishes which were under a local act, and, therefore, rendered valid arts. 67 and 83.

Fourthly, that the other articles merely regulated or controlled the relief or management of the poor, or the government of the workhouse, or merely guided or controlled the vestry-men, and, therefore, were within the powers given to the poor-law board by sect. 15 of stat. 4 & 5 Will. 4, c. 76, though some of them conflicted with the provisions of the local act.

After the rule for the *certiorari* was made absolute, but before the *certiorari* was served, the poor-law board issued an order rescinding so much of art. 66 as required the vestry to appoint such assistants and servants as the directors might deem necessary, and art. 88. A rule was subsequently obtained to quash the order:—

Held, first, that it was competent to the poor-law board to rescind the objectionable parts of the original order.

Secondly, that, the order being divisible, the court might quash part of it.

REGINA v. THE POOR-LAW COMMISSIONERS; *in re* THE UNITED PARISHES OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY.

Hilary Term, January 16, 1851.

PEACOCK moved for a *certiorari* to remove an order of the poor-law board or commissioners, dated the 21st of November, 1850, and addressed to the directors of the poor of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, in the county of Middlesex, to the vestry-men of the said united parishes, and to the church-wardens and overseers of the poor of the said united parishes. It appeared, from the affidavits, that the affairs of the joint parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, and of the separate parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, were regulated by stat. 11 Geo. 4, c. 10.¹ On the 21st of

¹ By the local act 11 Geo. 4, c. 10, a joint vestry is appointed for the management of the affairs of the two parishes, which were united for various purposes. The vestry make the poor rate, and expend it.

By sect. 51, the vestry-men of the said joint vestry may from time to time elect

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

November, 1850, the poor-law board issued the order in question for the government of the workhouse of the said united parishes; and on the 9th of December following, a notice of objections to the order, in pursuance of sect. 109 of stat. 4 & 5 Will. 4, c. 76, signed by T. D. Robinson, clerk to the vestry-men of the joint vestry of those parishes, was served upon the poor-law board. The parts of the order which were objected to were the following:—

“ Admission of Paupers.

“ Art. 1. Every pauper who shall be admitted into the workhouse, either upon his first or any subsequent admission, shall be admitted in some one of the following modes only—that is to say,—

“ By a written or printed order of the directors, signed by their clerk.

“ By a written or printed order, signed by an overseer or assistant overseer of the parishes.

“ By the master of the workhouse, (or, during his absence or inability to act, by the matron,) without any order, in any case of sudden or urgent necessity; provided, that the master may admit any pauper delivered at the workhouse under an order of removal

and appoint, (amongst other officers) “assistant overseers and beadles, together with such and so many other officers, agents, servants, and persons as they shall think proper,” and shall take security of the treasurers, collectors, or other receivers of money, for the faithful execution of their respective offices; and “may also from time to time suspend or remove any of the persons so elected or appointed, and appoint others in the place of those suspended or removed,” and shall order such salaries to be paid to such persons as they shall think proper; “and the several assistant overseers of the poor, who shall be appointed under the authority of this act, are hereby empowered to execute all such of the duties of the office of overseer of the poor as shall be directed by the vestry-men of the said joint vestry, in like manner, and as fully to all intents and purposes, as the same may be executed by law by any overseer of the poor.”

By sect. 58, the vestry-men of the said joint vestry shall annually nominate two inhabitant householders from each of the said parishes to be overseers of the poor of the said parishes respectively, to be appointed by the justices; and such persons shall execute all and every the powers and duties belonging to the office of overseer of the poor, except the power of making rates for the relief of the poor or for any other purposes, and except the powers given by that act to the vestry-men or to the directors of the poor. . . . “Provided always, that whenever an assistant overseer or overseers shall have been nominated and appointed as hereinbefore authorized, neither the church-wardens nor the said overseers shall interfere or intermeddle in or with the care, management, relieving, employment, or maintenance of the poor of the said parishes, in any case, except under the orders of the said vestry-men or of the directors of the poor; and all such overseers and assistant overseers as aforesaid shall severally and respectively, in the execution of the duties of their office, act in all things under the control and directions of the said vestry-men or the directors of the poor.”

By sect. 61, the vestry-men of the said joint vestry are empowered from time to time to make such rules and orders as to them shall seem right, for the election and good government of the directors of the poor, and of all officers, servants, and other persons employed under the said vestry-men or under the said directors in the execution of the act; and from time to time to alter or to repeal any such rules and orders, and to make others; . . . and such rules and orders shall be binding upon, and be observed by, all parties, and shall be sufficient in all courts of law or equity to justify all persons who shall act under the same; provided, &c.

By sect. 63, the vestry-men are required to elect annually twelve persons being

Reg. v. The Poor-law Commissioners; in re The U. P. of St. Giles-in-the-Fields, &c.

Sir F. Kelly, Peacock, and Cowling, contra.

[*Lord Campbell, C. J.* The court has sometimes, for the convenience of parties, given an opinion as to part of the order being good and part bad; but it would be better to quash the bad part, and declare that the rest should stand.]

No inconvenience could result from quashing the order altogether, because the acts done under it would be valid by sect. 108. That section contains no provision for quashing part only of an order; and there is no instance in which an order has been quashed in part. In *Reg. v. Hunt*, 12 Ad. & El. 130, the counsel for the poor-law board could not have been taken by surprise.

[*Lord Campbell, C. J.* In *Ex parte Coley*, 4 New Sess. Cas. 507, 510; 15 Jur. 128, Erle, J., said, "I am of opinion that the justices may abandon the void part of an order, if it appears on its face that it is severable from the residue. It seems to me to be a recognized principle of law, that an order, good in part and bad in part, if capable of being divided, may be sustained, *quoad* the good part; and I think it then follows that the valid part ought to be enforced without the useless expense of a *certiorari*."]

After the court has ordered an instrument to be brought up by *certiorari*, the party to whom the writ issues cannot do any act to alter its effect.

[*Lord Campbell, C. J.* The act of rescinding the objectionable parts of the original order was done by the poor-law board before the *certiorari* issued.]

The question still remains whether the poor-law board have rescinded all that the court held to be excess of jurisdiction. Alterations made in the order may introduce fresh objections; and the parish may not know whether to persist in the *certiorari* or move for another writ, because sect. 106 confines the party who applies for a *certiorari* to the grounds stated in his notice of objections. The order, as altered, might present objections of which the parish had not given notice.

LORD CAMPBELL, C. J. Why should we not follow the analogy of orders of justices? I do not see any thing in the clauses of stat. 4 & 5 Will. 4, c. 76, which is inconsistent with part of the order of the poor-law board being quashed, and the rest being held legal. With regard to the cases cited, they were only rules for a *certiorari*; and what was said on this point was *obiturn dictum*. Therefore, no decision stands in our way to prevent us doing what is just as between the poor-law board and the united parishes; and certainly the most convenient course is to quash part only of the order. With regard to the practice introduced in this instance by the poor-law board, of rescinding the objectionable parts of their order, I see no inconvenience in it. If the poor-law board have done enough to satisfy the parishes, no further step will be taken; if they have not done enough, the parish may still move for a *certiorari*.

Reg. v. The Poor-law Commissioners; in re The Vestry-men of St. James, Westminster.

PATTESON, COLERIDGE, and ERLE, JJ., concurred.

LORD CAMPBELL, C. J. We are still open to hear objections which may not have been removed by the rescissory order.

Peacock, in support of the rule. The whole of the 66th article is not rescinded. The 83d article assumes to the poor-law board the exclusive power of removing officers, whereas a concurrent power to remove should remain in the vestry-men. The vestry-men have power to take security for the good behavior of the master of the workhouse for three years; but he may remain in office without such security, if the sole power of removal is in the poor-law board. Therefore, if the 66th article stands, the 83d article ought to be struck out, as well as the proviso in art. 67; the 87th article, also, ought to be struck out.

LORD CAMPBELL, C. J. Does not the order deprive the vestry-men of a power, rather than regulate the exercise of it?

Sir A. J. E. Cockburn, A. G. The efficiency of the control to be exercised by the poor-law board consists in their having the exclusive and paramount power of removing officers. It was intended by the legislature, in passing stat. 4 & 5 Will. 4, c. 76, to place the power and control over the officers in the hands of the commissioners alone; and, therefore, the power of suspending and removing officers, given to the vestry-men by the local act, is repealed by sect. 46 of stat. 4 & 5 Will. 4, c. 76. It would be highly inconvenient, in the case of a conflict between the poor-law board and the vestry-men, that there should be a coördinate authority to remove officers. The poor-law board are willing to rescind the 65th article.

Cur. adv. vult.

REGINA v. THE POOR-LAW COMMISSIONERS; *in re* THE VESTRY-MEN OF ST. JAMES, WESTMINSTER.¹

Trinity Term, June 17, 1851.

PEACOCK moved for a writ of *certiorari* to bring up an order made by the poor-law board on the 17th of July, 1850, directed to the governors and directors of the poor of the parish of St. James, Westminster, in the county of Middlesex, to the vestry-men of the said parish, to the church-wardens and overseers of the poor of the said parish, &c. It appeared that the parish of St. James, Westminster, was governed by a body called "governors and directors," constituted by local acts, 2 Geo. 3, c. 58, and 56 Geo. 3, c. 54, under which the management and government of the poor of that parish had been

¹ 15 Jur. 841.

Reg. v. The Poor-law Commissioners ; in re The Vestry-men of St. James, Westminster.

carried on. By sect. 21 of stat. 2 Geo. 3, c. 58, the vestry-men were empowered to appoint governors and directors of the poor, and to make rules, orders, and regulations for applying and disposing of the moneys raised for the relief of the poor, and for maintaining, governing, employing, and regulating the poor of the parish. By virtue of that power, they had made a rule that the officers should be annual. The order in question was similar to that issued to the directors of the poor of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury.¹ At Easter in the present year, the occasion on which it had been the annual custom of the parish of St. James, Westminster, to elect or reelect certain officers, the governors and directors, disregarding the order of the poor-law board, by the 83d article of which it was directed that officers holding any office should continue to hold the same until death, or removal by the poor-law board, treated the office of chaplain as vacant, he having previously held under a nominal annual election, and proceeded to the appointment of another chaplain, and refused Dr. Wright, the chaplain in office, admission into the workhouse to perform his duty. In this term (May 28) a rule was obtained, calling upon the governors and directors to show cause why a writ of *mandamus* should not issue, commanding them to admit Dr. Wright into the workhouse of the said parish, to perform his duties as chaplain thereof, as specified in the order of the poor-law board.² The notice served upon the poor-law board on the 5th of June, in pursuance of sect. 106 of stat. 4 & 5 Will. 4, c. 76, stated the following, among other grounds of the application for the *certiorari*: "That the 66th and 67th articles attempt improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to and vested in the vestry-men of the said parish over and relative to the rules, orders, and regulations for applying and disposing of such moneys as shall be raised and received for the relief of the poor of such parish, and for the better maintaining, governing, employing, and regulating the poor of the said parish, as well as to give improper powers and authorities to the said governors and directors. That the 68th, 77th, 83d, and 90th articles attempt improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to, and vested in, the vestry-men of the said parish; and that they also respectively attempt improperly to take away, restrict, or control the jurisdiction, powers, and authorities given to, and vested in, the said governors and directors; and that they also respectively attempt to add to the jurisdiction, powers, and authorities lawfully given to, and vested in, the said poor-law board and poor-law commissioners." The principle which the court has laid down is, that the poor-law board may control the local board in their management of the poor, but not deprive them of the powers which the local act gives them. By this order, the poor-law board claim not only a right to remove the officers for particular grounds, under sect. 48 of stat. 4 & 5 Will. 4, c. 76, but to deprive the local board of their power of removal.

¹ See the preceding case.

² This rule was subsequently made absolute.

Reg. v. The Poor-law Commissioners; in re The Vestry-men of St. James, Westminster.

[*Lord Campbell*, C. J. Sect. 48 gives the poor-law board an unlimited power to remove, provided they act *bona fide*; it renders them the judges whether the persons filling these offices should be removed. If two independent bodies have power to remove any officer, it is likely to work very badly. The question is, whether the principle laid down in the judgment in *Reg. v. The Poor-law Commissioners, in re St. Giles-in-the-Fields and St. George, Bloomsbury*, does not apply. This will not effect any change in the constitution of the parish.

Coleridge, J. It compels the parish to alter their rule as to electing officers. But how can sect. 46 of stat. 4 & 5 Will. 4, c. 76, be satisfied, without giving the poor-law board the power contended for? Sects. 15 and 46 are to be read together, as forming part of the same system of law.]

There are many parishes which are not under a local act, or have not, under it, an express power to appoint officers. Where a local act has enacted that the officers shall be appointed in a particular manner, sect. 46 does not apply, so as to enable the poor-law board to direct that they shall be appointed in a different manner.

Sir A. J. E. Cockburn, A. G., (*Crompton and Tomlinson* were with him,) contra. This is the same point as was argued in *Reg. v. The Poor-law Commissioners, in re St. Giles-in-the-Fields and St. George, Bloomsbury*. By sect. 46 of stat. 4 & 5 Will. 4, c. 76, the poor-law board have power to direct for what period these officers shall continue to hold office; and impliedly that power is exclusively vested in them. Also, the enactment is general, and applies where the parish is under a local act. [He referred to sects. 15, 21, and 48, and was stopped.]

Peacock and Keane, contra. Art. 66 virtually supersedes or repeals sect. 21 of stat. 2 Geo. 3, c. 58; and then a conflict of authorities will follow, which the court has said ought not to be. Sect. 22 of stat. 4 & 5 Will. 4, c. 76, has no reference to the removal of officers.

LORD CAMPBELL, C. J. Upon an examination of the sections of stat. 4 & 5 Will. 4, c. 76, I entertain no reasonable doubt that it was the intention of the legislature to give the poor-law board exclusive power with regard to those officers whom they direct the parish officers or board of guardians to appoint; the other officers, who are appointed independently of the direction of the poor-law board, are left as they were before the passing of the act. Sect. 46 empowers the commissioners "to direct the mode of the appointment, and determine the continuance in office or dismissal of such officers." How can they be said really to determine the continuance in office of an officer, if the officer may be dismissed by the vestry or parish officers on the following morning without cause assigned? Indeed, Mr. Peacock properly admitted, that, if sect. 46 applied to this case, it warranted the order in question; but he attempted to argue that the 46th section did not apply to parishes which were under a local act. He did not, however, succeed in showing that it had not a general application. If a parish is not governed by a local act, the overseers have

Reg. v. The Poor-law Commissioners; in re The Vestry-men of St. James, Westminster.

incidentally, by virtue of stat. 43 Eliz. c. 2, the power of appointing and dismissing officers. Then shall it be said, that, where parishes have the power indirectly, the poor-law board may exercise the power, but not where a parish has it expressly under a local act? I am of opinion that the section has a general application to all the parishes in England. There is only one instance, under our monarchy, in which there is a concurrent power of dismissal, viz., the governor general of the East India Company; and it would lead to most inconvenient consequences if, in every parish, there was a concurrent power of dismissing officers in the overseers and in the poor-law board.

PATTESON, J. The question turns on the meaning of the 46th section of stat. 4 & 5 Will. 4, c. 76, the words of which are clear and express. [His lordship read them.] The words are very general, and if they conflict with the words of a local act, the enactment in the local act must give way. The 83d article of the poor-law board is in the words of sect. 46, because it says, "Every officer appointed to, or holding, any office under this order shall continue to hold the same until he die or resign, or be removed by the poor-law board," more particularly with reference to sect. 48. Therefore, the 83d article is valid.

COLERIDGE, J. I am of the same opinion. The whole question turns on the application of sect. 46. The meaning of that section, if it applies, is clear; because, when the poor-law board have determined the continuance in office of any officer, it cannot be carried out if any other body has a concurrent power of dismissal. We are told that sect. 46 has not so wide an application. But sect. 48, which gives the power to the commissioners of removing the master of a workhouse, or assistant overseer, or other paid officer of any parish or union, is admitted to extend to parishes which are under a local act, and yet there are no words in it of more definite application than the words in sect. 46; and it would be strange if the two sections had a different application. Again: sect. 46 is divided into two parts; the first part empowers the commissioners to direct the overseers or guardians of any parish or union to appoint such paid officers as the commissioners shall think necessary; and the term "guardian," in the interpretation clause, (sect. 109,) is to be construed to mean and include, among others, "any visitor, governor, director, or other officer in a parish or union appointed to act as a manager of the poor, and in the distribution or ordering of the relief of the poor from the poor rate, under any general or local act;" therefore, it can hardly be doubted that the first part of the 46th section refers to this parish; that is, the order to appoint such officers would be good. Then it is almost impossible to hold that the second part of the section should have a narrower construction.

ERLE, J., concurred.

Rule for a certiorari to bring up the order of the Poor-law Board in re The Vestry-men of St. James, Westminster, discharged.

Regina v. Wilson.

LORD CAMPBELL, C. J. The opinion of the court in this case will dispose of the rule in *Reg. v. The Poor-law Commissioners, in re St. Giles-in-the-Fields and St. George, Bloomsbury*.

Peacock. Does sect. 46 apply to officers who were appointed by the vestry-men for a limited period, before the order of the poor-law board was made? If an officer is to be continued in office, without giving the vestry-men the power of appointing him again, the enactment has the operation of an *ex post facto* law.

LORD CAMPBELL, C. J. The officer will be liable to be removed by the poor-law board for misbehavior.

Rule to quash the order of the Poor-law Board in re the United Parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, discharged, the poor-law board consenting to rescind the 65th article.

REGINA, on the Prosecution of the Overseers of the Parish of Liverpool, v. WILSON.¹

Trinity Term, June 7, 1851.

Maintenance of Pauper — Order of Justices — Appeal.

By sect. 80 of stat. 8 & 9 Vict. c. 126, any person who shall think himself aggrieved by any order or determination of justices under this act, other than orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance, may, within four months after such order or determination made or given, appeal to the Quarter Sessions:—

Held, that no appeal lies against an order of two justices upon the treasurer of a county for the payment of the costs of the maintenance of a lunatic pauper who had been adjudged chargeable to the county under sect. 63.

APPEAL against orders of two justices respectively adjudicating Henry Thompson, a lunatic, to be chargeable to the county of Lancaster, and directing payment of the expenses of his maintenance. The order of maintenance was dated the 6th of August, 1850, and directed to C. M. Wilson, Esq., treasurer of the county of Lancaster. After reciting that the pauper, being found in the parish of Liverpool, in the county of Lancaster, but not settled in the said parish, had been sent to, and received into, the lunatic asylum of the said county, and there confined at the expense of the said parish, and that "it cannot be ascertained in what parish the said pauper lunatic is settled;" that notice had been given by the overseers of the parish of Liverpool to the clerk and deputy clerks of the peace for the said county of the several premises, and calling upon them to appear for the said county before two justices of the peace for that county to show cause why the said pauper lunatic should not be adjudged

¹ 20 Law J. Rep. (N. S.) M. C. 232. 15 Jur. 859.

Regina v. Wilson.

chargeable to the said county; that W. C. appeared on behalf of the clerk and deputy clerks of the peace, in pursuance of the said notice, and the justices then present, having inquired into the circumstances of the case, and (the contrary not having been shown) upon due proof upon oath before them then and there had and taken, did find that all the premises were true, and did, by an order under their hands and seals then and there made, bearing date, &c., adjudge the said pauper lunatic to be chargeable to the said county of Lancaster, which said order is still in full force and effect; that notice had been given to the said clerk and deputy clerks of the peace, and to the said treasurer of the said county of Lancaster, that the overseers of the said parish would apply for an order upon the said treasurer for the payment of all expenses incurred by, and on behalf of, the said parish in and about the examination and conveyance to the said asylum of the said pauper lunatic, and for his maintenance, incurred within twelve calendar months previous to the date of such order, as also for his future maintenance, and that, at the time and place last aforesaid, an application was accordingly made to C. B. and T. B., two of the justices of the said county of Lancaster; the order directed the treasurer of the said county to pay to the overseers of the said parish certain specified sums in respect of the examination, conveyance, and maintenance of the said pauper lunatic. Notice of appeal against the said orders was given on the 5th of December, 1850, by the treasurer of the said county, and the parties to the said appeal, by consent, and by the order of a judge, stated a special case for the opinion of this court, pursuant to sect. 11 of stat. 12 & 13 Vict. c. 45.

The material facts stated in the case were, that the said pauper lunatic was found in, and became chargeable to, the said parish of Liverpool, on the 22d of May, 1847. At the instance of the overseers of the said parish, the order was made in the borough of Liverpool and county aforesaid, by two justices of the peace of and for the said county, for the reception of the said pauper into the said county lunatic asylum, under which said order the said pauper was removed to the said asylum on the 24th of January, 1847, where he had since been confined, and to the 6th of August, 1850, had been maintained at the charge and expense of the said parish. On the 5th of July, 1850, a notice was served upon the clerk and deputy clerks of the peace of the said county, and upon the appellant as treasurer, which stated that the said pauper was confined in the said asylum at the instance of one of the said overseers, pursuant to the statute in that case made and provided, but was not settled in the said parish, and that it could not be ascertained in what parish the said pauper was settled; and further called upon the said clerk and deputy clerks of the peace to appear and show cause, as recited in the above order of maintenance. It was contended for the appellant that the overseers of the respondents had not made proper inquiry to ascertain the place of settlement of the pauper lunatic before obtaining the order. The respondents objected that the appellant had no right to proceed to the trial of this appeal; that no appeal lay against either the order

Regina v. Wilson.

adjudging this lunatic to be chargeable to the county of Lancaster, or against the order for maintenance and reimbursement of expenses. If the Court of Queen's Bench shall be of opinion, upon the said objections of the respondents, or on any one of them, that the said appellant is not entitled to prosecute his appeal, judgment in conformity with the decision of such court, and for such costs as such court shall adjudge, may be entered on motion by the respondents, or either of them, at the Quarter Sessions for the said county next, or next but one, after such decision shall have been given; but if the decision shall be in favor of the appellant, a judgment in favor of the hearing of such appeal, and for such costs as the said court shall adjudge, may be entered on motion by the appellant at the Quarter Sessions for the said county next, or next but one, after such decision shall have been given, and the appeal shall be tried on the same merits at the same sessions. The case was argued by

Pashley, for the respondents. The county has no right of appeal against this order. The county is only chargeable when the settlement of the pauper lunatic cannot be ascertained; and when the settlement is discovered, power is given to the county to transfer the burden of maintaining him. By sect. 59 of stat. 8 & 9 Vict. c. 126, if any pauper lunatic shall not be settled in the parish by which, or at the instance of some officiating clergyman or officer of which, he shall be sent to any asylum, and it cannot be ascertained in what parish such pauper lunatic is settled, the relieving officer of the union in which such first-mentioned parish is situated, or the overseers of such first-mentioned parish, shall give notice to the clerk of the peace of the county in which such lunatic was found, to appear for such county before two justices thereof, and such two justices may inquire into the circumstances of the case, and, unless the contrary be shown, shall adjudge such pauper lunatic to be chargeable to such county; and by sect. 63, if it shall be ascertained or adjudged, in due course of law, that such lunatic is chargeable to a county, it shall be lawful for any two justices of the county in which such asylum is situate to make an order upon the treasurer of such county so chargeable as aforesaid for payment to the treasurer of the guardians of any union or parish of all expenses incurred by, or on behalf of, such union or parish in or about the examination of such lunatic and his conveyance to the asylum, and for the lodging and maintenance of such lunatic incurred within twelve calendar months, and for payment of the future maintenance of such lunatic. But no appeal is given against that order by sect. 63; whereas an appeal is given, by the proviso of sect. 62, against a similar order made upon the guardians of any union or parish, or the overseers of any parish, when the settlement of the lunatic is ascertained to be in that parish, under sect. 58, which gives power to two justices to inquire at any time into the settlement of a pauper lunatic in an asylum. An appeal against this order is unnecessary, because the 59th section provides that the county shall have notice of the proceeding, in order that it may appear and show cause why the order should not be made; and further

Regina v. Wilson.

protects the interests of the county by providing that the justices may direct such inquiry to be made to ascertain the parish in which any pauper is settled as they shall think fit, and to delay adjudging a pauper to be chargeable to any county until such further inquiry shall have been made; and provides also, that every county, to which any pauper lunatic shall be adjudged to be chargeable as aforesaid, may at any time thereafter inquire as to the parish in which such lunatic is settled, and may procure such lunatic to be adjudged to be settled in any parish; so that the subsequent discovery of the settlement is provided for; and the county is entitled to reimbursement by sect. 64, which enacts, that if the county shall afterwards procure, in due course of law, such lunatic to be adjudged to be settled in any parish, in pursuance of the second proviso in sect. 59, it shall be lawful for two justices to make an order upon the treasurer of the guardians of the union including any parish, or of any parish, or the overseers of any parish, for the payment to the treasurer of the county of all expenses and moneys paid by such last-mentioned treasurer as hereinbefore is provided, and incurred within twelve calendar months previous to such order. It will be contended that an appeal is given by the general appeal clause, sect. 80, but that excepts orders adjudicating as to the settlement, and providing for the maintenance of lunatic paupers. By that section, any person who shall think himself aggrieved by any order or determination of the justices under this act, other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance, may, within four calendar months after such order or determination made or given, appeal to the Quarter Sessions, the person appealing having first given at least fourteen days' notice in writing of such appeal, and the nature and matter thereof, to the person appealed against, and forthwith, after such notice, entering into a recognizance conditioned to try such appeal, and to abide the order and award of the said court thereupon; and the Quarter Sessions shall hear such appeal, and, if they see cause, may reduce any penalty or forfeiture to not less than one fourth of the amount imposed by this act, and may order any money to be returned which shall have been levied in pursuance of such order or determination, and may also award such further satisfaction to be made to the party injured, or such costs to either of the parties, as they shall judge reasonable and proper. In the clause, "other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance," the word "and" may be read "or," since the adjudication of the settlement and the provision for the maintenance may be contained in the same instrument, or may be made separately. *Reg. v. Tyrowhitt*, 12 Q. B. 292; 12 Jur. 557.

[*Patteson, J.* If the clerk of the peace of the county has knowledge of the settlement of the lunatic pauper, he ought to bring it forward before the justices; if he have not, the order must be good at the time when it is made, and there is ground for appealing against it.

Erle, J. The 80th section may have excluded orders adjudicating as to the settlement, because there is no appeal against an order

Regina v. Wilson.

adjudicating the settlement. The appeal against an order of maintenance is an appeal also against the order adjudging the settlement.]

Peacock, contra. This is not an order "adjudicating as to the settlement of the lunatic pauper," within the meaning of sect. 80 of stat. 8 & 9 Vict. c. 126. It is important that an appeal against it should lie, otherwise, upon notice being given to the clerk of the peace of the county, in pursuance of sect. 59, the whole burden of maintaining the lunatic pauper may be thrown upon the county.

[*Lord Campbell, C. J.* That is merely a condition precedent to the justices having jurisdiction to adjudge the lunatic pauper to be chargeable to the county. What would be the subject of the appeal?]

The appeal would be on the ground that it had not been sufficiently shown that it could not be ascertained in what parish the pauper was settled.

[*Lord Campbell, C. J.* That would be what Lord Ellenborough called appealing *in vacuo*.

Erle, J. Why should not the chargeability be thrown upon the county?]

The county have not the means of investigating the settlement.

[*Lord Campbell, C. J.* The overseers of the parish must show that the settlement cannot be ascertained before the justices can make the order adjudging the lunatic pauper to be chargeable to the county. What else does the jurisdiction of the justices to make the order depend upon but that the lunatic pauper has been found in the parish, and that his settlement cannot be ascertained?]

Suppose the county could prove to the justices that, though he was not settled in the parish which proposes to make the county chargeable, he was settled in another parish, and the justices refused to receive the evidence of the settlement, or adjudicated upon the evidence offered that he was not settled in that parish.

[*Lord Campbell, C. J.* The question would be, whether there was evidence to go to the justices of the existence of a settlement.

Erle, J. Your hypothesis is, that no two justices will make an order adjudging the settlement under sect. 59, though there is evidence to support it; notwithstanding, when two justices refuse to make an order, the county may apply to two others. Suppose the justices proceed *bona fide*, there is a provision in sect. 59, by which, if there is a sign of a probable settlement, the justices are empowered to adjourn the proceeding, in order that inquiry may be made to ascertain the parish in which the pauper is settled.

Coleridge, J. This is only in the nature of an interim order until the settlement is found.]

LORD CAMPBELL, C. J. I am of opinion, for the reasons which I have already thrown out, that the order is good, and that no appeal lies against it.

PATTESON, COLERIDGE, and ERLE, JJ., concurred.

Judgment for respondents.

Regina v. The South-eastern Railway Company.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF QUEEN'S BENCH.]

REGINA, on the Prosecution of EDWARDS, v. THE SOUTH-EASTERN RAILWAY COMPANY.¹

Trinity Vacation, June 18, 1851.

*Railway Company — Right to cross Turnpike — Option of the Company as to the Manner of crossing.**

By sect. 46 of stat. 8 & 9 Vict. c. 20, "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge, of the height and width, and with the ascent or descent, by this or the special act in that behalf provided."

Mandamus recited that the railway which defendants were empowered to make crossed, not on a level, a certain public highway, by means of a trench twenty feet deep and sixty-five feet wide, through and along which the line of the railway had been carried, and the permanent way thereof had been laid down, and the said public highway was thereby cut through and destroyed, and rendered wholly impassable for passengers and carriages; and that a reasonable time for defendants to cause the said public highway to be carried over the railway by means of a bridge, in the manner provided in stat. 8 & 9 Vict. c. 20, had elapsed; and commanded defendants to cause the said public highway to be carried over the railway by means of a bridge, in conformity with the regulations in that behalf, that is to say, [specifying the particulars in Sect. 50]:—

Held, first, that, it not being otherwise provided by the special act, defendants had, by sect. 46, an option to carry the highway over the railway, or the railway over the highway, by a bridge.

Secondly, that the option given by sect. 46 was not determined by defendants having cut through the highway by a deep trench, and laid down the permanent way of the railroad in the trench.

MANDAMUS. The writ recited that the railway from the London and Greenwich Railway to Woolwich and Gravesend, in the county of Kent, which the defendants were authorized and empowered to make by stat. 9 & 10 Vict. c. 305, (local and personal, public,) crossed, not on a level, a certain public highway, situate and being in the parish of Plumstead, in the county of Kent, called the "Plumstead Villas Road," by means of a certain trench or cutting, twenty feet deep and sixty-five feet wide, made by the defendants, through and along which said trench or cutting the line of the said railway had been by the defendants caused to be and was carried, and the permanent way thereof had been by the defendants and was laid down therein, and the said public highway was thereby cut through and destroyed, and rendered wholly impassable for passengers and carriages; that the available width for the passage of carriages within fifty yards of the points of crossing the same is, and at the time the same road was so crossed as aforesaid was, greater than twenty-five feet; that although a reasonable time for the defendants to cause the said public highway to be carried over the said railway, by means of a bridge, in the manner provided in stat. 8 & 9 Vict. c. 20, (the Rail-

¹ 20 Law J. Rep. (N. S.) Q. B. 428. 15 Jur. 871.

Regina v. The South-eastern Railway Company.

ways Clauses Consolidation Act, 1845,) had long since elapsed, yet the defendants had refused and neglected, and still did refuse and neglect, to cause the said public highway to be carried over the said railway, by means of a bridge, in the manner by the said act provided; by reason of which said neglect and refusal the said public highway had remained, and still was, wholly impassable to passengers and carriages. The writ commanded the defendants to cause the said public highway to be carried over the railway by means of a bridge, in conformity with the regulations in that behalf, that is to say, (the writ specified the particulars in sect. 50 of stat. 8 & 9 Vict. c. 20.) Return, that the said way or road in the writ mentioned was not a public highway as in the writ is in that behalf suggested and alleged. Plea traversing the return.

On the trial, before Pollock, C. B., at the Spring assizes at Maidstone in 1850, the jury found that the way or road in the writ mentioned was a public way, as in the writ suggested and alleged; and thereupon judgment was given, by the Court of Queen's Bench, that a peremptory writ of *mandamus* do issue. In Hilary term, 1851, the defendants brought a writ of error, which was argued in Easter vacation, May 14, before Parke, B., Maule, J., Cresswell, J., Platt, B., Williams, J., and Martin, B., by

Peacock, for the plaintiffs in error, (the defendants below.) First, assuming the road to be such as the railway ought to cross by a bridge, or such as ought to cross the railway upon a bridge, the defendants have, by sect. 46 of stat. 8 & 9 Vict. c. 20,¹ (except where otherwise provided by the special act, and there is no provision in this behalf in stat. 9 & 10 Vict. c. 305,) the option of carrying the road over the railway, or of carrying the railway over the road; and the *mandamus* is so framed as to deprive them of that option. The point was not raised in the court below, because no motion was made in arrest of judgment.

[*Maule, J.* It might be impossible to carry the railway over the road. The writ says that a reasonable time had elapsed for carrying the highway over the railway by means of a bridge. May it not mean that the thing commanded is a reasonable thing to be done, especially after verdict?]

Whether the act commanded to be done is reasonable, or not, is left uncertain. The court cannot tell whether the road ought to be made to pass under or over the railway, unless it is informed of the

¹ By sect. 46 of stat. 8 & 9 Vict. c. 20, "If the line of the railway cross any turn-pike road or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent or descent, by this or the special act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company: provided always, that with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway other than a public carriage road, on the level."

Regina v. The South-eastern Railway Company.

state of the land on each side; it has no jurisdiction to adjudge that the crossing shall be effected in one particular mode, that being matter of engineering. [He cited *Reg. v. The York and North Midland Railway Company*, in error, 15 L. J., Q. B., 379; *Reg. v. The Caledonian Railway Company*, 15 Jur. 396; s. c. 3 Eng. Rep. 285; and sects. 47, 49, and 51 of stat. 8 & 9 Vict. c. 20.]

Secondly, the writ commands the defendants to make the bridge with an ascent of not more than one foot in twenty feet, in pursuance of sect. 50 of stat. 8 & 9 Vict. c. 20; but the writ does not show that the present is a case in which the ascent should be so restricted. By sect. 52, the existing mesne inclination of the road to be crossed need not be improved, and, therefore, the *mandamus* is not justified by the statute. [He cited *Rex v. The Church Trustees of St. Pancras*, 3 Ad. & El. 535; and *Reg. v. The Tithe Commissioners*, 14 Jur. 290.]

Thirdly, it does not appear that the alleged highway was a public highway at the time of the passing of the special act; it may have been dedicated to the public after the special act passed.

[*Parke, B.* Stat. 8 & 9 Vict. c. 20, would equally apply.]

Needham, contra. First, sect. 46 of stat. 8 & 9 Vict. c. 20, does not give to the company the option contended for. When the railway crosses a road not a level, the railway must be either above or below the road; and sect. 46 provides two remedies applicable to the two cases respectively. The alternative of carrying the road under a bridge is not to be found in sect. 46. But if the company have any option, it is determined when the road has been cut through, and the permanent way has been laid down.

[*Parke, B.* What is to prevent the defendants lowering the road, and taking it under the railway? The argument on the other side is, that they are not bound to do one act before the other.

Maule, J. The term, "the railway shall be carried over such road," seems to refer to the original construction of the works. If the company carry the railway over the road, it must be by a bridge. The company might have stopped when their works reached the road, and built the bridge, and so carried the railway over the road in the manner specified in sect. 49; or, if it was necessary, they should have deepened the road with proper slopes, and so they would have been able to comply with the letter of the alternative given in sect. 46; the railway would have been carried over the road by means of a bridge.]

If it was impossible to cause the road to be carried over the railway by means of a bridge, the company might have returned that it was impossible. *Reg. v. The London and North-western Railway Company*, 15 Jur. 873; s. c. *post*, p. 220. *Reg. v. The Caledonian Railway Company*, 15 Jur. 396; s. c. 3 Eng. Rep. 285.

[*Maule, J.* In *Rex v. The Bristol Dock Company*, 6 B. & Cr. 181, though the thing required to be done was nearly impossible, the court commanded the defendants to do it.¹ But *nemo tenetur ad impossi-*

¹ See the return in that case.

Regina v. The South-eastern Railway Company.

bilis. T. F. Ellis, *amicus curiæ*, mentioned *Rex v. Round*, 4 Ad. & El. 139.]

The court will intend the state of facts to be such as will support the writ, and such as is not inconsistent with the facts stated on the record. Further, the writ shows that the road has been cut through and destroyed, and, therefore, the railway cannot be carried over it. Secondly, the description of the manner in which the bridge is to be built is under a *videlicet*. The writ may be considered as stating, in effect, that a bridge, in conformity with the regulations in sect. 50, must be such as is described, and that it is not within sect. 52. Further, sect. 52 comes by way of proviso. Thirdly, as to the objection that the writ does not state that the road is a carriage road, a highway is *prima facie* a carriage road; and the writ states that it had been rendered, and still was, wholly impassable to passengers and carriages.

Peacock, in reply. A bridge may still be made under the railway, and so the railway be carried over the road. Suppose a road stopped up by an embankment, on which a railway passes, the company might erect a bridge in the embankment for the purpose of reopening the road.

[*Maule*, J. The prosecutor complains of a nonfeasance. Should not the company have returned that they omitted to make the bridge in ignorance of the facts? The defendants do not say that the public will have a better way. If the defendants have rendered it impossible to do the act which they were required to do in the first instance, they must do the act which they are bound to do in failure of their performance of the first act.]

After the railway is made, it is equally competent for the company to do one as the other. The defendants have seven years for completing the line, and by sect. 16 of stat. 8 & 9 Vict. c. 20, "they may from time to time alter, repair, or discontinue the before-mentioned works, or any of them, and substitute others in their stead." If the defendants have done wrong in omitting to make the bridge for carrying the railway over the road before they interfered with the road, it does not follow that the court have power to compel them to carry the road over the railway by means of a bridge. The defendants, if indicted for a nuisance, would be bound to fill up the cutting and restore the road; and, therefore, what they have done is not so permanently fixed that they have lost the option given them by sect. 46. Again: by sect. 16, the defendants "may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads," &c., "such temporary or permanent inclined planes, tunnels," &c., "as they think proper."

[*Maule*, J. The defendants might carry the highway under the railway by a tunnel; but I doubt whether a tunnel is a bridge.]

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court. After stating the pleadings, his lordship proceeded: On the part of the plaintiff in

Regina v. The South-eastern Railway Company.

error it was argued that the *mandamus* was bad, because by the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 46, the railway companies had, in every case where the line of railway crosses a public highway not on a level, (where no other provision was made by the special act, and there was none in this case,) an option to carry the highway over the railway, or the railway over the highway, by a bridge; and this *mandamus*, by ordering the company to cause the public highway to be carried over the railway, deprived the company of the option which the act of Parliament gave them.

Two answers were offered by the learned counsel for the defendants in error. First, that by the stat. 8 & 9 Vict. c. 20, s. 46, no such option was given. Secondly, if it was, that, from the facts stated on the face of the *mandamus*, it was to be collected that it had been already exercised, and that no other alternative now existed but the construction of a bridge to carry the highway over the railway.

As to the first answer, we have no difficulty in saying that the act of Parliament gave an option to the company. Mr. Needham contended that the proper construction of the 46th section was, that if the highway was above the level of the line of railway, a bridge was to be made for it over the railway; if below, for the railway over it. But this is not the ordinary meaning of the language contained in the clause, which, according to the usual rule of construction, directs either one thing or the other to be done, which is a case of election, when, according to the rule of law, the party to do the act is to have the choice which act he will do; and there is very good reason for this construction, for it would be hard, if the way was only a few inches below the line, to force in all cases the company to make a bridge for the railway over it, or *vice versa*; and how could it be if the highway was on a declivity, and above on one side, and below on the other, the line of the railway? We have no doubt that the legislature meant, what they have said, that in such a case the company were to judge for themselves, thinking that they would determine what was best, according to the varying circumstances in which the choice would have to be made.

The next answer was, that, allowing the option to have been given by the statute, it had been exercised, and no other course was now open to the company than to make the bridge for the highway over the railway. It was said that the company had cut through the way by a deep trench; and though the allegation that it was twenty feet deep might not bind the company, and, therefore, was not to be assumed as an admitted fact, yet that it was admitted that the line of railway was carried through that trench, and the permanent way thereof laid down therein, and the public highway destroyed; and that when the highway is destroyed, and no longer exists, and the permanent way is laid down, the option is at an end. It is on this part of the case that we have entertained some doubt; but our opinion is, that enough does not appear to determine the option clearly given to the company in the first instance.

Whether the cutting the road was an indictable misdemeanor, or not, must depend upon a fact of which we can take no notice, viz.

Regina v. The South-eastern Railway Company.

whether a new temporary road was made before the trench was dug, as it clearly ought to have been by sect. 53. One may conjecture that it was not, because the company appear to have acted as if the road intersected was not a highway, and, therefore, probably did not make the new road required by the act in such a case; but, judging from the record, it is only a conjecture, and the fact does not appear one way or the other. But even if the deep cut were a public nuisance, and indictable, it does not follow that the option was determined. It would be competent, for any thing that appears to the contrary, so far as relates to the injury to the road by interrupting it by means of a trench, to restore the communication by a bridge over the highway, or over the railroad.

It is then said that the option is determined by laying down the permanent rail in the trench; but we think, that though the rail may be intended, when laid down, to be permanent, it would be permitted to the company to take it up afterwards, and carry the railroad over the highway if they found it more convenient. Under the 16th section, they have the power from time to time to alter their works, or any of them, and substitute others in their stead, and do all other acts necessary for altering the railway. But it is said, that under the 46th section they are to be precluded from carrying their railway over a road, except by a bridge constructed whilst the road exists as such; and if they first destroy the road, they put an end to the power of so doing. We do not think that they are precluded from carrying their railway over the road by a bridge except whilst it exists as a road, any more than they are precluded from carrying the road over a railway except when the railway exists as such. The section does not, we think, mean that the railway shall be carried over when first made, but merely that it shall be constructed so as to pass or be over it.

We are of opinion, therefore, that there is nothing stated on this record which shows that the company's option is at an end; and as the option clearly did exist at one time, we think the *mandamus* is bad, and that the judgment ought to be reversed, and judgment given to quash the *mandamus*.

Judgment reversed.

Regina v. The London and North-western Railway Company.

REGINA v. THE LONDON AND NORTH-WESTERN RAILWAY
COMPANY.¹

Easter Term, May 7, 1851.

*Railway Company—Compulsory Purchase of Land—Mandamus—
Return.*

Mandamus, tested the 22d of April, 1850, commanded a railway company immediately to purchase lands necessary for making, constructing, and completing a branch railway, and to make, construct, and complete the same, in pursuance of the provisions, powers, and authorities contained in the recited acts of Parliament. The special act, 9 & 10 Vict. c. 262, which received the royal assent on the 27th of July, 1846, enacted, by sect. 18, that the powers of the company for the compulsory purchase of lands for the purposes of that act should not be exercised after the expiration of three years; and by sect. 20, that the works thereby authorized should be completed within five years, and on the expiration of such period the powers granted to the company for executing the same should cease to be exercised, except as to so much of the same as should then be completed:—

Held, first, that the court ought not to have issued the writ, the power of the company for the compulsory purchase of lands having expired before it was applied for.

Secondly, that the return was good, without showing an application to all the land owners, and a refusal by them.

Quære, whether there lay upon the company an obligation to make and complete the railway, which might have been enforced by *mandamus*; and whether want of funds for the purpose would be an answer.

MANDAMUS to the London and North-western Railway Company, tested the 22d of April, 1850, commanding them to purchase the lands necessary for making, constructing, executing, and completing the Birstal Branch Railway and extension thereof, and to make, construct, execute, and complete the same Birstal Branch Railway and extension thereof, in pursuance of the provisions, powers, and authorities contained in the Leeds, Dewsbury, and Manchester Railway Act, 1845, 8 & 9 Vict. c. 36, the Leeds, Dewsbury, and Manchester Deviations and Branches Railway Act, 1846, 9 & 10 Vict. c. 262, and the act incorporating the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and North-western Railway Company, 10 & 11 Vict. c. 159, and as they had been required to do by an application duly made to them in that behalf, to wit, on the 18th of June, 1849.

Return, that the said Leeds, Dewsbury, and Manchester Railway Company were not at any time from the passing of the Leeds, Dewsbury, and Manchester Railway Act, 1845, or from the time of the passing of the Leeds, Dewsbury, and Manchester Deviations and Branches Railway Act, 1846, until the time of the passing of the act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and North-western Railway Company, nor were the said London and North-western Railway Company at any

¹ 20 Law J. Rep. (n. s.) Q. B. 399. 15 Jur. 873.

Regina v. The London and North-western Railway Company.

time since the passing of the said last-mentioned act of Parliament, nor were they at the time of the coming of the writ to them, nor are they now, nor have either of the said companies at any time hitherto been by law liable or bound, under or by any of the said several acts of Parliament in the annexed writ mentioned or referred to, or any or either of them, to make or maintain the branch railway in the said writ mentioned, commencing, &c. That by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, in the said writ mentioned, (sect. 4,) after reciting that the estimated expense of making the said railway in the said act mentioned was 640,000*l.*, it is, amongst other things, enacted that the capital of the said company should be 650,000*l.* Provided, nevertheless, that if, under the provisions therein-after contained, the said company should not execute so much of the railway thereby authorized as lay between the town of Huddersfield and the junction thereof with the Manchester and Leeds Railway, then the capital of the said company should be only 500,000*l.* That by the same act, (sect. 44, after reciting that a bill was then pending before Parliament, intituled "An Act for making a railway from the Sheffield, Ashton-under-Lyne, and Manchester Railway, at Stalybridge, to the Manchester and Leeds Railway at Kirkheaton, with a branch therefrom, and for consolidating into one undertaking the said proposed railway and the Huddersfield canal navigation;" and that the line of the railway and one of the branches thereof thereby respectively authorized to be made, and the line of the intended railway of the company proposed to be incorporated by the last-recited bill, under the name of the "Huddersfield and Manchester Railway and Canal Company," follow the same course between the town of Huddersfield and the Manchester and Leeds Railway, being a distance of about four miles; and that it was expedient that provision should be made, and that an arrangement should be effected, under the authority of Parliament, between the said two companies, with respect to the construction of the said portion of railway, and the said branch; and that it had accordingly been agreed between the said two companies, that the company by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, incorporated, should suspend the making of so much of their proposed railway and branch as lay between Huddersfield aforesaid and the said Manchester and Leeds Railway; and that the said last-mentioned portion of the said railway and the said branch should be made by the said Huddersfield and Manchester Railway and Canal Company; it is enacted, that none of the powers and authorities by that act given to, or vested in, the said company by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, incorporated, should be, or should be capable of being, put into force or executed by the said company thereby incorporated, in respect of the making of that portion of the said railway, and the branch which lay between Huddersfield aforesaid and the Manchester and Leeds Railway, for the space of eighteen months after the passing of that act; and that if the said Huddersfield and Manchester Railway and Canal Company should, before the expiration of the said eighteen months, have com-

Regina v. The London and North-western Railway Company.

menced and proceeded *bona fide* in the execution of that part of the said railway and branch, then, and in such case, all and every the powers and authorities vested in the said company by the said Leeds, Dewsbury, and Manchester Railway Act, 1845, incorporated, so far as respected the making of that portion of the said railway and branch, and also all liabilities of the said last-mentioned company in respect of such portion and branch, should absolutely cease and be at an end. That by the said act, shortly intituled "The Leeds, Dewsbury, and Manchester Deviations and Branches Railway Act, 1846," (sect. 2,) after reciting that the estimated expense of the works by that act authorized was 100,000*l.*, it is enacted, that it should be lawful for the said company to raise the sum of 100,000*l.* by the creation of new shares, as they should think fit, in addition to the sum of money they were authorized to raise by their former act, or might be authorized to raise by an act to be passed during the then present session of Parliament. That by the said act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and North-western Railway Company, in the annexed writ mentioned, it is, amongst other things, enacted, (sect. 32,) that it should be lawful for the London and North-western Railway Company, after the commencement of that act, and subject to the provisions therein contained, to exercise all the powers, with reference to the raising of money, either by the creation of new shares, or by mortgage, which might have been granted to the Huddersfield and Manchester Railway and Canal Company, or the Leeds, Dewsbury, and Manchester Railway Company, respectively, by the said acts recited in the said last-mentioned act relating to such companies respectively, and which might be then in force, and also all powers which might have been or be granted to the said respective companies respectively by an act or acts of the then present or the then next session of Parliament, and for such purposes to create additional shares in the London and North-western Railway Company, or to mortgage or assign the undertaking, and the rates, tolls, or other property of the London and North-western Railway Company, as the case might be, but so, nevertheless, that the total amount of money to be raised by the London and North-western Railway Company, under the powers of that act and of the said acts therein recited, and any other act or acts of the then present session, should not exceed the aggregate amount of capital which the London and North-western Railway Company, and the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company were or might be authorized to raise under the powers of the said several recited acts, and any other act or acts of the then present or the then next session relating to their respective undertakings. That no powers for the raising of money for any of the purposes aforesaid, by the creation of new shares, or by mortgage or otherwise, were granted to the said several companies, or any of them, by any act or acts of the then present, or then instant, or any other session of Parliament; and that, before the expiration of eighteen months next after the passing of the Leeds,

Regina v. The London and North-western Railway Company.

Dewsbury, and Manchester Railway Act, 1845, the said Huddersfield and Manchester Railway and Canal Company commenced, and *bona fide* proceeded in, the execution of that part of the said railway and branch which lay between Huddersfield aforesaid and the Manchester and Leeds Railway; and that the said portion of the said railway and branch was made by the said Huddersfield and Manchester Railway and Canal Company, whereby the powers and authorities by the said last-mentioned act given to, and vested in, the said Leeds, Dewsbury, and Manchester Railway Company, so far as respected the making the said portion of the said railway and branch, and all the liabilities of the said last-mentioned company in respect of such portion and branch, from the time of such commencement and proceeding as aforesaid, absolutely ceased and were at an end, whereby the capital of the said Leeds, Dewsbury, and Manchester Railway Company, under the said Leeds, Dewsbury, and Manchester Railway Act, 1845, became and was reduced to the sum of 500,000*l.*, and under the said Leeds, Dewsbury, and Manchester Deviations and Branches Act, 1846, the further sum of 100,000*l.*, making together the sum of 600,000*l.* only, and no more, which was, and ever since has been, the full, and entire, and only capital of the said Leeds, Dewsbury, and Manchester Railway Company which they were empowered to raise either by the said acts, or by any other act whatsoever. That after the passing of the said Leeds, Dewsbury, and Manchester Railway Act, 1845, and after the passing of the said Leeds, Dewsbury, and Manchester Deviations and Branches Act, 1846, and before the passing of the said act to incorporate the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the said London and North-western Railway Company, and before any such application was made to the said London and North-western Railway Company as in the annexed writ mentioned, and before the coming of the said annexed writ to them, the said Leeds, Dewsbury, and Manchester Railway Company had, under the powers and authorities in them vested by the said Railway Acts of 1845 and 1846, raised the whole of the said several sums of 500,000*l.* and 100,000*l.*, making together the sum of 600,000*l.*, so by them authorized to be raised as aforesaid, and had *bona fide*, and duly and necessarily, and according to, and in pursuance of, the several acts of Parliament aforesaid, wholly expended the same, and every part thereof, in and about making the said railway from Leeds by Dewsbury to Huddersfield aforesaid, (except that portion of the said railway and branch which was so made by the said Huddersfield and Manchester Railway and Canal Company as aforesaid,) and in improving the communication by railway between the towns of Leeds and Huddersfield aforesaid and the town of Manchester, as by the said acts of 1845 and 1846 they were authorized and empowered to do; and that the said Leeds, Dewsbury, and Manchester Railway Company had not, nor had the said London and North-western Railway Company, at the time when such application was made as aforesaid, or at the time of the coming of the annexed writ to them, nor have they or either of them now,

Regina v. The London and North-western Railway Company.

any power or authority whatsoever, by the said acts of Parliament in the annexed writ mentioned and referred to, or any or either of them, or by any other act of Parliament whatsoever, to raise or procure, for the purposes of making the said railway from Leeds by Dewsbury to Huddersfield, or improving the communication by railway between the said towns of Leeds and Huddersfield and the town of Manchester, or any deviations therefrom or branches thereof, or for the purchase of lands, or for executing any works whatsoever under or by virtue of the said several acts, or any of them, any further or other sum than the said sum of 600,000*l.* so by the said Leeds, Dewsbury, and Manchester Railway Company heretofore raised and expended as aforesaid. That before any such application was made to them as in the said annexed writ is mentioned, and before the passing of the said act for incorporating the Manchester and Huddersfield Railway Company, and the said Leeds, Dewsbury, and Manchester Railway Company, with the London and North-western Railway Company, the said Leeds, Dewsbury, and Manchester Railway Company had wholly expended the said full sum of 600,000*l.* so by them authorized to be raised and expended as aforesaid in and about the making of the said railway from Leeds by Dewsbury to Huddersfield, (except that portion of the said railway and branch which was so made by the said Huddersfield and Manchester Railway and Canal Company as aforesaid,) and in improving the communication by railway between the towns of Leeds and Huddersfield aforesaid and the town of Manchester, as by the said acts of 1845 and 1846 they were authorized and empowered to do; and at the said time when the said application in the annexed writ was so made to them as aforesaid, had no money, or power to raise money, for the purchase of lands necessary for making, constructing, executing, or completing the said Birstal Branch Railway and extension thereof, or any or either of them, or any part thereof. That after the said application in the annexed writ mentioned was made to the said London and North-western Railway Company to purchase the necessary lands for making, constructing, executing, and completing the said Birstal Branch Railway and extension thereof, and to make, construct, and complete the same, according to the provisions contained in the said Leeds, Dewsbury, and Manchester Railway Act, 1845, and the said Leeds, Dewsbury, and Manchester Deviations and Branches Act, 1846, and the said act incorporating the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, with the London and North-western Railway Company, and before the reasonable time in that behalf had elapsed, and before the coming to the said London and North-western Railway Company of the annexed writ to them, to wit, on the 27th of July, 1849, all the powers and authorities of the said Leeds, Dewsbury, and Manchester Railway Company, and of the said London and North-western Railway Company, to purchase the necessary lands for making, constructing, executing, and completing the said Birstal Branch Railway and extension thereof, had, according to the provisions contained in the said Leeds, Dewsbury, and Manchester

Regina v. The London and North-western Railway Company.

Railway Act, 1845, and the said Leeds, Dewsbury, and Manchester Deviations and Branches Railway Act, 1846, and the said act for incorporating the Huddersfield and Manchester Railway and Canal Company, and the said Leeds, Dewsbury, and Manchester Railway Company, with the London and North-western Railway Company, wholly ceased and determined, and were entirely at an end; wherefore the said London and North-western Railway Company, before the coming of the annexed writ to them, and for the said space of time in the said writ mentioned, delayed and suspended the further works authorized to be done by the said acts of Parliament in the annexed writ mentioned, for making, constructing, executing, and completing the said Birstal Branch Railway and extension thereof, as it was lawful for them to do, for the causes aforesaid.

Special demurrer, and joinder therein.

The demurrer was argued in this term ¹ by

Knowles, (*Watson* and *Hodges* were with him,) for the prosecutor. First, it was the duty of the defendants to have purchased the lands necessary for making the line of railway, as laid down in the deposited plans and sections, before the expiration of the powers given to them for that purpose in the special act. The acts obtained by companies are in the nature of contracts, made by the legislature on behalf of every person interested in any thing to be done under them. Lord Eldon in *Blakemore v. The Glamorganshire Canal Company*, 1 My. & K. 162. *Rex v. Cumberworth*, 3 B. & Ad. 108. *Rex v. Edge Lane*, 4 Ad. & El. 723. *Rex v. Cumberworth*, Id. 731. The undertaking to procure funds for the purpose of completing the entire line and the branches was the consideration for the powers granted to the Leeds, Dewsbury, and Manchester Railway Company, and the defendants are bound by the obligations of that company. In *Reg. v. The Eastern Counties Railway Company*, 10 Ad. & El. 531, it was held that this *mandamus* would lie; and that case was recognized in *Cohen v. Wilkinson*, 2 Beav. 1; 14 Jur. 491, and *Carlisle v. The South-eastern Railway Company*, 14 Jur. 515. The return, that the defendants have no money for the purchase of lands necessary for making this branch railway, is no answer. *Reg. v. The Trustees of the Luton Roads*, 1 Q. B. 860; 1 G. & D. 248. *Reg. v. The Commissioners of Woods and Forests, in re Budge*, 15 Jur. 35, proceeded upon a distinction between commissioners for the crown and a railway company. Further, it does not appear that the company have not, or at least cannot procure money sufficient to complete this branch; there is no reason why the tolls should not be applied to that purpose.

Secondly, the return is bad on special demurrer. It does not allege that there is a necessity for the exercise of the powers for the compulsory purchase of lands, or that the defendants could not purchase the lands by private agreement. The marking out of the

¹ April 30, before LORD CAMPBELL, C. J., PATTESON, WIGHTMAN, and ERLE, JJ.

Regina v. The London and North-western Railway Company.

land with stakes could not have been done without some steps having been taken for purchasing it. Again: the compulsory powers had not expired when application was made to the defendants to complete the branch; and the power to make the branch will not expire until next July. In *Reg. v. The Birmingham and Oxford Junction Railway Company*, 14 Jur. 899, it was held, that the expiration of the time for the compulsory purchase of lands was no answer to a *mandamus*, at the instance of the land owner, commanding the company to complete the purchase of his land.

[*Erle, J.* In that case, it was a most possible thing for the company to buy land.]

The defendants cannot set up their own negligence as an answer to this *mandamus*, otherwise there would be no limit to the non-execution of the powers granted to a company.

[*Lord Campbell, C. J.* Suppose an application made only a short time before the compulsory powers expire, and the company *bona fide* cannot do the act required?]

The company must, if necessary, resort to Parliament for additional powers; at any rate, they are bound to do all they can. The return does not show an impossibility to do what is commanded by the writ; and, therefore, the court will issue a peremptory *mandamus*. *Reg. v. The Birmingham and Gloucester Railway Company*, 2 Q. B. 47; 6 Jur. 146.

Sir F. Kelly, (*Sir John Bayley* with him,) contra. There is no principle or authority binding on the court to issue a peremptory *mandamus*, where, without the default of the defendants, it has become impossible for them to do what the writ commands. The obligation of the defendants is to do all that the Leeds and Dewsbury Railway Company, in favor of which the special acts were passed, ought to do with the funds of that company. That company were empowered to raise a capital of 600,000*l.*, and they raised and expended the whole of that sum before they were incorporated with the defendants.

[*Lord Campbell, C. J.* By stat. 10 & 11 Vict. c. 59, there is a unity of exchequer; the defendants might apply the money arising from the tolls on their railway to the repair of the line between Leeds and Dewsbury, if it was completed; why may they not apply that money to complete it to the point in question?]

The return states that, "at the time when the application in the writ was made to them, the defendants had no money for the purchase of lands necessary for making the branch railway."

[*Erle, J.* The meaning of that allegation is, that the defendants had no money applicable by law to the purchase of lands necessary for that purpose.

Lord Campbell, C. J. The return sufficiently negatives the possession of funds, upon the hypothesis that the defendants are only bound to make the branch line out of the 600,000*l.*, but no further.]

That is the estimate adopted by the legislature of the cost of the undertaking.

Regina v. The London and North-western Railway Company.

[*Lord Campbell*, C. J. There is only one set of shareholders. Are the defendants entitled to make a dividend before they complete their contract with the public?]

The legislature must have been satisfied that the 600,000*l.* which they empowered the Leeds and Dewsbury Railway Company to raise would be sufficient to complete the work; and that sum having been applied towards it, the contract has been fulfilled, though the work remains unfinished. The return shows a lawful excuse, either on the ground of want of funds, or on the ground that the time for exercising the compulsory powers has expired. In *Reg. v. The Eastern Counties Railway Company*, 10 Ad. & El. 531, the time had not expired, nor had the company raised the whole of the sum which their special act empowered them to raise. The special acts contain no words of obligation or compulsion, but only empower the company to make the railway.

[*Lord Campbell*, C. J. The words "it shall be lawful" are obligatory upon the company when the object of the enactment is to confer a benefit upon the public, or upon the land owner. *Reg. v. The Caledonian Railway Company*, 15 Jur. 396; 3 Eng. Rep. 285. The company may not be bound to begin the railway; but if they do begin it, are they not bound to make it as prescribed by the act, and, therefore, to complete it?]

In all the instances in which a peremptory *mandamus* has been issued to a company to do a particular work, as in *Reg. v. The Birmingham and Gloucester Railway Company*, 2 Q. B. 47; 6 Jur. 146, the railway was engaged in constructing the work in question, or had completed it; and in that case the court said, that the special act having required the work to be constructed in a particular manner, the company must construct it in that manner.

[*Lord Campbell*, C. J. Suppose an intermediate part of a railway was left unfinished, whereby the public were inconvenienced, the *mandamus* would only be to complete it; so, when there is a portion unfinished at the extremity.]

In *Reg. v. The Eastern Counties Railway Company*, 10 Ad. & El. 531, where that question was raised, Lord Denman, C. J., on making the rule absolute, said, (p. 550,) "Upon the whole, without coming to any final decision, we think the case is involved in sufficient doubt to require a return to the *mandamus*, and that the writ should go for that purpose." What fell from the court on the return was *obiter dictum*, because the *mandamus* was quashed.

[*Lord Campbell*, C. J. If the want of funds was clearly made out, it would furnish a strong argument to the discretion of the court.]

There has been no wilful default of the defendants, and there is not reasonable time for them to enter into contracts for the purchase of the necessary lands; and therefore the court, in the exercise of its discretion, will not issue a peremptory *mandamus*. *Rex v. Round*, 4 Ad. & El. 139.

Knowles, in reply. The issuing of a peremptory *mandamus* is not a matter of discretion; the court has only to see whether the

Regina v. The London and North-western Railway Company.

return is good. In *Reg. v. The Bristol Dock Company*, 2 Q. B. 64, 70, the court doubted whether an objection that the *mandamus* was to do an act, for the omission to do which the company might be prosecuted by indictment, was not too late after the writ had issued. By sect. 7 of stat. 10 & 11 Vict. c. 159, it is provided and enacted, "That all works which, under the provisions of the acts relating to the Huddersfield and Manchester Railway and Canal Company, and the Leeds, Dewsbury, and Manchester Railway Company, respectively, or any of such acts respectively, the same companies respectively are or shall be authorized or required to execute or complete, and which shall not have been executed or completed before the period aforesaid, shall be executed or completed by the London and North-western Railway Company; and the same company shall have full power to pay for the same respectively out of the respective moneys placed at their disposal by this act or otherwise." This language is imperative; and it is implied that some part of the works were unfinished within the knowledge of the defendants. Sects. 13, 14, 15, and 16 provide for the creation of new shares, and show what is meant by the words "or otherwise" in sect. 7. By sect. 10, the capital of the said respective companies is declared to be part of the capital of the London and North-western Railway Company; and the receipts from the Huddersfield and Manchester, and the Leeds, Dewsbury, and Manchester Railways respectively, and all branches or extensions and other works thereof respectively made, or to be made, under the authority of the said acts, and all works connected therewith respectively, and from other sources of income, shall be deemed receipts on the account of the London and North-western Railway Company.

[*Lord Campbell*, C. J. A complete unity of the companies is established. But there is not an existing legal obligation to complete the railway after the time for the exercise of the compulsory powers has expired.]

The defendants have, by their own delay, interposed the difficulty, and, therefore, they cannot excuse themselves on that ground.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court. In this case, we are of opinion that the defendants are entitled to our judgment. The objection, that the powers of the company for the compulsory purchase of lands had expired before the writ of *mandamus* issued or was applied for, seems to us to be clearly decisive.

We are not called upon, therefore, to decide the more doubtful questions, whether there lay upon the company an obligation to make and complete the railway which might have been enforced by *mandamus*, or whether the return sufficiently shows a want of funds for the purpose, or how far this want of funds would be an answer.

This writ of *mandamus*, which is tested the 22d of April, 1850, commands the company "immediately to purchase lands necessary for making, constructing, executing, and completing the Birstal Branch Railway and extension thereof, and to make, construct,

Regina v. The London and North-western Railway Company.

execute, and complete the same Birstal Branch Railway and extension thereof, in pursuance of the provisions, powers, and authorities contained in the recited acts of Parliament." The special act, 9 & 10 Vict. c. 262, which received the royal assent on the 27th of July, 1846, enacts, by sect. 18, "that the powers of the company for the compulsory purchase of lands for the purposes of this act shall not be exercised after the expiration of three years from the passing of this act;" and by sect. 20, "that the works hereby authorized shall be completed within five years from the passing of this act, and, on the expiration of such period, the powers granted to the company for executing the same shall cease to be exercised, except as to so much of the same respectively as shall then be completed."

The power effectually to obey the command in the writ having expired in July, 1849, ought we, in the queen's name, to have given the command in April, 1850? On full consideration, we think not. A writ of *mandamus* supposes the required act to be possible, and to be obligatory when the writ issues. Generally speaking, the writ suggests facts showing the obligation, and the possibility of fulfilling it. A return pursuing this suggestion, and traversing it, is good. *Rex v. The Commissioners of Sewers in Essex*, Str. 763. *Rex v. Round*, 4 Ad. & El. 139. *Rex v. Williams*, 8 B. & Cr. 681. *Rex v. Penrice*, Str. 1235. The supposed obligation here is founded on public acts of Parliament, which are recited in the writ and return, and of which we are bound to take judicial notice. If they show that the company have no longer power to do the act commanded, the writ is bad. What power have the defendants now to purchase the lands necessary for making a line of railway of several miles? A peremptory *mandamus* going as is prayed, no excuse can afterwards be made, and the defendants must implicitly and fully obey it, under pain of imprisonment. Supposing that they were bound to pay any prices which might be demanded, however extortionate; can it reasonably be supposed that all the land owners along the line will be willing to sell at any price, and that none of them are under disability to sell? Mr. Knowles contended that the return should have shown an application to all the land owners, and a refusal by them. But such a return, and the issues arising upon it, would be highly inconvenient; and even if all had promised to sell, without a binding contract having been entered into, they might afterwards change their minds, and the defendants might be subject to perpetual imprisonment for not doing what the law forbids them to do.

It was then said that they have violated the acts of Parliament by not duly completing the whole of the railway, and that they ought not to be allowed to make the objection, which amounts to taking advantage of their own wrong. But assuming that they were under the obligation contended for, and that they were liable to be punished by indictment for a breach of it, how can we say that the remedy now is to command them to do what they have no longer the power to do, however obediently they may be inclined? Reliance was very properly placed on the case of *Reg. v. The Birmingham and Gloucester*

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

Railway Company, 2 Q. B. 47; 6 Jur. 146, which at first sight seems an authority in favor of the *mandamus*, but, when properly examined, it will be found on this point to be entitled to little weight. The great struggle there was, whether the turnpike road, when restored, must be as wide as it had formerly been; there the notice to do the act had been given as early as possible, and the act to be done was merely to restore the turnpike road to its former width, which apparently required no purchase of land, either voluntary or compulsory. In the present case, the prosecutors were guilty of laches, by giving no notice to do the act till the power of doing it was expiring, and not applying for the *mandamus* till a considerable time after the power had expired. In the former case, the company might reasonably have been expected to be able to do the act without any power of compulsory purchase; but, in the present case, this is a mere impossibility.

We, therefore, think that, both on principle and on authority, our judgment must be for the defendants. *Judgment for defendants.*¹

CORT & another v. THE AMBERGATE, NOTTINGHAM, BOSTON, AND
EASTERN JUNCTION RAILWAY COMPANY.²

Trinity Term, June 4, 1851.

*Contract for the Sale of Goods—Damages for Non-acceptance—
Measure of Damages.*

When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract.

Declaration in covenant upon a contract under seal for railway chairs to be supplied by plaintiffs to defendants, an incorporated railway company, at certain times and in certain quantities, to be paid for after delivery. Averment, that plaintiffs were ready and willing to execute and perform the contract according to the conditions and stipulations; and that defendants had accepted and received a certain quantity of the chairs. Breach, that defendants refused to accept and receive the residue, and prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract. It appeared that plaintiffs would have gone on regularly making and delivering the chairs according to the contract, if they had not received a notice from defendants that they did not wish to have any more chairs, and would not accept any more. After receiving that notice, plaintiffs ceased to make any more:—

Held, that plaintiffs were entitled to a verdict on a plea traversing the allegation, that they were ready and willing to execute and perform the contract, although they never made and tendered the residue of the chairs:—

Held, also, that plaintiffs were entitled to a verdict on a plea traversing that defendants refused to accept or receive the residue of the chairs, and that they prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract; because, first, the material part of the allegation was, that

¹ See *Reg. v. The York, Newcastle, and Berwick Railway Company*, post, p. 259.

² 15 Jur. 877.

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

defendants refused to receive the residue of the chairs; and, secondly, assuming that the whole must be proved, plaintiffs might be prevented from completing the contract otherwise than by positive physical force, and defendants, though a corporation, might discharge plaintiffs from the performance of the contract otherwise than by instrument under seal:—

Held, also, that, in estimating the damages, the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which defendants refused to accept.

DECLARATION in covenant upon a contract under seal, between the plaintiffs and the defendants, for certain railway chairs, to be supplied to the defendants by the plaintiffs, according to a certain specification made by the defendants, the material parts of which were as follows: "The quantity of chairs required will be 900 tons of joint and 3000 tons of intermediate chairs, and will have to be delivered at such places, and in such proportions, as described in the annexed list, to be delivered out of barges, and placed upon" certain public wharves therein mentioned, at certain times (beginning in February, 1847, and continuing each month until May, 1848, inclusive) and in certain quantities; "the payments will be made by the directors of the company one month after delivery, on the contractor producing the written certificate of the person appointed by the company to receive and inspect the chairs, declaring that the contract for such portion has been duly performed." "The engineer shall have full power to alter the deliveries, in any way or proportion, to the different places before specified, by sending information to the contractor, from time to time, of the manner in which such deliveries are to be made; and the contractor shall be paid according to the prices set forth in his tender." The declaration then stated the proposal of the plaintiffs to supply the defendants with 3900 tons of cast-iron chairs, subject to the conditions and stipulations set forth in the specification, &c., and the agreement between the plaintiffs and the defendants for the execution and performance of the said proposal. Averment, that the plaintiffs, in pursuance and part performance of the said contract, did deliver to the defendants, and the defendants did accept and receive of and from the plaintiffs, 1787 tons, and although one month from the respective delivery of the said chairs had respectively elapsed before the commencement of this suit, and the plaintiffs had produced to the defendants such written certificates as aforesaid in respect of the quantities of chairs so delivered as aforesaid, the defendants had not paid the plaintiffs for the chairs so delivered as aforesaid, after the rates and in manner in that behalf mentioned and agreed, or otherwise howsoever. And the plaintiffs, in fact, further say, that although they, the plaintiffs, were always, from the time of the making of the said contract until such refusal and wrongful discharge by the defendants as hereinafter mentioned, and thence hitherto, ready and willing to execute and perform the said proposal, according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, and to perform and fulfil the said contract in all things on their part and behalf to be performed and fulfilled, whereof the defendants always, during all the time aforesaid, had notice; and although the defendants, in pursuance and part performance of the

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

said contract on their part, have accepted and received of and from the plaintiffs a certain quantity of the said chairs, to wit, 1787 tons thereof; and although the time so limited and appointed for the execution and performance of the said contract by the plaintiffs as aforesaid had long since elapsed, nevertheless the defendants afterwards, to wit, during the time so limited and appointed for the execution and performance of the said contract by the plaintiffs as aforesaid, to wit, on, &c., wrongfully and injuriously and wholly refused, and have thence hitherto wholly refused, to accept or receive of or from the plaintiffs the residue of the said chairs so agreed to be supplied to, and accepted by, the defendants as aforesaid, or any part thereof, according to the form and effect of the said contract, or otherwise howsoever; and then, and have thence hitherto, wholly and wrongfully prevented and discharged the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them, the plaintiffs; whereby they, the plaintiffs, have been deprived of, and wholly lost, all the benefits, profits, and advantages which might and would have arisen and accrued to them from the complete execution and performance by them, the plaintiffs, of the said contract, and have been put to great costs, charges, and expenses, to wit, to the amount of 2000*l.*, in and about making necessary provision, preparations, and arrangements for the complete execution and performance by them of the said contract on their part. And the plaintiffs, after the making of the said contract, to wit, on, &c., in reliance upon the performance and fulfilment of the said contract by the defendants on their part, made and entered into divers contracts with divers persons, to wit, &c., (naming them,) for the said parties with whom respectively the plaintiffs so contracted as last aforesaid, selling and supplying to the plaintiffs divers quantities of iron, to be used by the plaintiffs for, and in, and about the manufacture and supply of the said chairs to be so supplied by them to the defendants as aforesaid. And the plaintiffs were, by reason of the defendants' said breach of this contract as last aforesaid, forced and obliged to discharge the said several parties respectively from the execution and performance, on their respective parts, of the said several contracts so made with them respectively as aforesaid, and to pay to the said several parties respectively, as and by way of compensation for, and in respect of, such several discharges as last aforesaid, divers large sums of money respectively, the same together amounting to a large sum of money, to wit, to the sum of 2000*l.*

The defendants set out on oyer the contract, which included the specification, and pleaded, thirdly, as to so much of the said declaration as alleged that the plaintiffs were ready and willing to execute and perform the said proposal, according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, that the plaintiffs were not ready and willing to execute and perform the said proposal, according to the said conditions and stipulations, and subject to the said specification, in manner and form, &c. Conclusion to the country. Fourthly, as to so much of the said declaration as charged the defendants with having, during the time limited and

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

appointed for the execution and performance of the said contract by the plaintiffs, refused to accept or receive the said residue of the said chairs, and prevented and discharged the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them, the plaintiffs, that the defendants did not, during the said last-mentioned time, refuse to accept or receive the said residue, nor did they prevent or discharge the plaintiffs from supplying the said residue, or from the further execution and performance of the said contract by the plaintiffs, in manner and form, &c. Conclusion to the country.

On the trial, before Coleridge, J., at the Nottinghamshire Spring assizes, it appeared that the action was brought by the plaintiffs, who were iron founders and manufacturers, against the defendants, who were incorporated by a special act of Parliament, and subject to the provisions of the Companies Clauses Consolidation Act. The contract for the iron chairs, which are a kind of joint to which the rails of railways are fixed, having been made in December, 1846, the first delivery was made by the plaintiffs in May, 1847, and from that month to September they went on delivering, and certain deliveries were accepted by the defendants, but not of quantities corresponding with the amounts stipulated for, being in some months at the rate of 150 tons a month, in other months at the rate of 180 tons. After September, the deliveries were at the rate of forty and eighty tons a month. In September, and subsequently, conversations took place between a clerk of the plaintiffs and the engineer of the company, and also between one of the plaintiffs and the engineer, in which the engineer frequently requested the plaintiffs to go on slowly in making the chairs, as the calls were not paid up, and he did not know how far the line would be carried out; and in January, 1848, he told the clerk not to send any more until they were wanted. A few more were sent subsequently, and in December, 1849, the engineer of the company directed the plaintiffs to make no more, as no more would be wanted. At that time 2113 tons of chairs remained to be delivered. It was contended for the defendants, first, that, in order to satisfy the condition, the plaintiffs ought to have proved that the chairs in question were made, and ready for delivery, or that a tender had been made by them to the defendants at the times and in the manner directed by the contract, or at least some time prior to the commencement of the action; secondly, that there was not sufficient refusal by the defendants to accept the chairs, inasmuch as the company were not bound by the acts of their engineer, his refusal not being within the powers delegated by the contract to the engineer. The learned judge held, that it was not necessary for the plaintiffs to put themselves to the expense of preparing the chairs if they were not likely to be wanted, and that the plaintiffs were not bound to make more chairs, and tender them, after the engineer of the company had given them notice that they would not be wanted; and he advised the jury, that, under the circumstances, they might consider the acts of the engineer as the acts of the company, as far as the plaintiffs were concerned; and, after stating all the evidence to the jury, he said that he

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

could not point out to them, by way of calculation, what the damages ought to be, but that they should be such as would put the plaintiffs as nearly as possible in the same situation as they would have been in if they had been allowed to complete the delivery of the chairs. The jury gave a verdict for the plaintiffs, damages 1800*l*.

In the following Easter term, April 28,—

Macaulay obtained a rule *nisi* for a new trial upon the ground of misdirection, and also on the ground of the damages having been assessed on a wrong principle, because the delivery of the chairs was to be made monthly, and some of them had not been delivered according to the proposal, when the notice not to deliver more was given.

In this term,¹—

Humfrey and *Wilmore* showed cause, and cited *Glaver v. The London and North-western Railway Company*, 5 Exch. 66.

Macaulay and *Denison*, contra, cited *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815. *Beverley v. The Lincoln Gas-light and Coke Company*, 6 Ad. & El. 829. *Paine v. The Guardians of the Strand Union*, 8 Q. B. 326; 10 Jur. 308. *Cox v. The Midland Counties Railway Company*, 3 Exch. 268. *Ridley v. The Plymouth Grinding and Baking Company*, 2 Exch. 711. *West v. Blakeway*, 2 Man. & G. 729. Com. Dig., "Condition," L. 6, M. 5. *Fraunces's Case*, 8 Rep. 89 b, 91 b. *Phillpotts v. Evans*, 5 M. & W. 475. *Ripley v. M'Clure*, 4 Exch. 345. *Brymer v. The Thames Haven, Dock, and Railway Company*, 2 Exch. 549. *Cook v. Jennings*, 7 T. R. 381. *Planche v. Colburn*, 8 Bing. 14.

Humfrey then referred to *Goodman v. Pocock*, 14 Jur. 1042; and *Erle, J.*, mentioned *Elderton v. Emmons*, 6 C. B. 160.

LORD CAMPBELL, C. J., now delivered the judgment of the court. We are of opinion that the verdict found for the plaintiffs ought not to be disturbed.

As to the supposed misdirection, the learned judge, at the trial, did not direct the jury that in point of law the engineer had authority to bind the company, but only left it to the jury to consider whether, in point of fact, the company, by their mode of dealing, had authorized and sanctioned his acts. His lordship intimated that he thought the evidence was strong to show that they had done so, but that it was for the jury to give the evidence its due weight. The objection of misdirection, therefore, fails.

Next, we have to consider whether the plaintiffs were entitled to a verdict on the issue, whether "they were ready and willing to execute and perform the said contract, according to the said conditions and stipulations, in manner and form," &c.; and on the issue, whether

¹ May 27, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

"the defendants did refuse to accept or receive the residue of the chairs, or prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract." It is not denied that, if the defendants would have regularly accepted and paid for the chairs, the plaintiffs would have gone on regularly making and delivering them, according to the contract. The objection is, that although the plaintiffs were desirous that the contract should be fully performed, yet after receiving the notice that the company did not wish to have any more chairs, and would not accept any more, they ceased to make any more, insomuch that the residue, which the company are alleged to have refused to accept, never were made. The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract; that the defendants cannot be charged with a breach of it; that after the notice from the defendants, which, in truth, amounted to a declaration that they had broken and thenceforward renounced the contract, the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them according to the pattern, with the name of the company upon them, and to bring them to the appointed places of delivery, and tender them to the defendants, who, from insolvency, had abandoned the completion of the line for which the chairs were intended, desiring that no more chairs might be made, and declaring, in effect, that no more should be accepted or paid for.

We are of opinion, however, that the jury were fully justified, upon the evidence, in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense, the meaning of such an averment of *readiness and willingness* must be, that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labor, which might possibly enhance the amount of damages to be awarded against them.

Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, "Make no more for us, for we will have nothing to do with them," was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendants laid peculiar stress upon the words, "nor did they prevent or discharge the plaintiffs from supplying the residue of the chairs, and from the further execution and performance of the contract." We consider the material part of the allegation which the last plea traverses to be, that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

residue of the chairs, and from the further execution of the contract. It is contended that "prevent" here must mean an obstruction *by physical force*; and in answer to a question from the court, we were told it would not be a preventing of the delivery of goods if the purchaser were to write in a letter to the person who ought to supply them, "Should you come to my house to deliver them, I will blow your brains out." But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done except by physical force or brute violence? Again: we are told that there can be no "discharge" by a corporation, unless by deed under the corporate seal. Of a discharge, in one sense of the word, this is true; a discharge is sometimes used as equivalent to a *release*, which must be under seal. *Brymer v. The Thames Haven, Dock, and Railway Company*, 2 Exch. 549. But we conceive that, in the allegation traversed by the last plea, "discharge" only means, like "prevent," that the act of the defendants was the cause of the residue of the chairs not being delivered, and of the contract not being further executed or performed. Taking the language employed in its natural and reasonable sense, there was abundant evidence to support the finding of the last issue for the plaintiffs.

It is averred, however, that there are express authorities to show that there could be no readiness and willingness to perform the contract, unless all the chairs were finished and tendered; that to *prevent* must be by positive physical obstruction; and that there can be no *discharging* unless by instrument under seal.

The first case relied upon was *West v. Blakeway*, 2 Man. & G. 729, in which, an action being brought by lessor against lessee on a covenant to yield up at the expiration of the term all erections and improvements set up or made during the term, assigning for breach the removal of the sashes and framework of a greenhouse erected during the term, it was held to be a bad plea that there was a subsequent parol agreement between the parties, that if the lessee would erect a greenhouse, he should be at liberty to pull it down and remove it. But this merely illustrates the well known rule, that a covenant under seal cannot be varied by parol; *Unumquidque ligamen dissolvitur eodem ligamine quo ligatum est*. It has no application to a case where the covenantor is prevented from performing the covenant by the covenantee. In 1 Roll. Ab. 453, and in 5 Vin. Ab., "Condition," (M. c.,) 242, 2d ed., will be found various instances of a covenant being discharged without deed, by the act of the covenantee.

The next case relied on by the defendants' counsel was *Phillpotts and others v. Evans*, 5 M. & W. 475. That was an action of *assumpsit* for not accepting a quantity of wheat sold early in January, 1839, by the plaintiff, at Gloucester, "to be delivered at Birmingham as soon as vessels could be obtained for the carriage thereof." On the 26th of January, the defendant gave notice to the plaintiff that he would not accept the wheat if it were delivered. It was then on its way by canal to Birmingham, and on its arrival there the defendant was required to accept it, but he refused to do so. The only question at the

Cort & another v. The Ambergate, Nottingham, &c., Railway Company.

trial was as to the time with respect to which the damages were to be calculated. The market having continued to fall from the day of the contract till the bringing of the action, the defendant sought to take advantage of his own wrong, and to calculate the damages according to the price in the market on the 26th of January, when he gave notice that he intended to break the bargain; but it was very properly held that the plaintiffs were entitled to damages according to the market price when the wheat was tendered to the defendant for acceptance. The court cannot be considered as having decided, that if the notice had been received by the plaintiffs before the wheat was sent off from Gloucester, the plaintiffs might not, at their pleasure, have treated it as a breach of the contract, and commenced an action against the defendant for not accepting it, without tendering it to him at Birmingham.

The most recent case cited by the defendants' counsel was *Ripley v. M^r Clure*, 4 Exch. 345. This case is very complicated in its circumstances, but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory contract, whereby the plaintiffs agreed to sell, and the defendant to buy, on arrival, certain goods, to be delivered at Belfast, at a certain price, payable on delivery, it was held, that a refusal by the defendant, before the arrival of the cargo, to perform the contract, was not, of itself, necessarily a breach of it, but that such refusal, unretracted down to, and inclusive of, the time when the defendant was bound to receive the cargo, was evidence of a *continuing refusal*, and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract. But in the case at bar, the refusal never was retracted; and, therefore, there was a continuing breach down to the time when this action was commenced.

Upon the whole, we think we are justified on principle, and without trenching on any former decision, in holding, that when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.

We are likewise of opinion, that in this case the damages are not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept. They were all included in the declaration and in the issues joined. The time mentioned in the proposal for the delivery of some of them had arrived before the notice was given; but

Knaggs v. Knaggs.

the time of delivery was not of the essence of the contract, and the obligation was still incumbent upon the defendants to accept the whole of the residue.

The rule must, therefore, be discharged.

Rule discharged.

KNAGGS v. KNAGGS.¹

Bail Court, Trinity Term, June 16, 1851.

Pleading — Joinder of Issue — Similiter.

A rejoinder concluded to the country with an "&c.," but no *similiter* was added:—

Held, that, as issue was not joined, the defendant was not entitled to judgment as in case of a nonsuit; and that the *similiter* would not be intended from the "&c."

The *similiter* would be intended from the "&c." after verdict.

In this case, a rule *nisi* had been obtained for judgment as in case of a nonsuit. It appeared that issue had been joined upon four pleas; but to the fifth plea the plaintiff had replied a set-off, to which the defendant rejoined the Statute of Limitations, concluding to the country; but he did not add the *similiter*, nor had the plaintiff surrejoined.

Hoggins now showed cause. Issue could not be said to be joined till the *similiter* was added; the defendant could not, therefore, come to the court and ask for judgment as in case of a nonsuit. *Wright v. Oldfield*, 8 Dowl. 899.

Hoskins, in support of the rule, submitted that the "&c." with which the rejoinder concluded was sufficient, and must be taken to include the words "and the plaintiff doth the like," which it would, therefore, have been quite superfluous to set out at length. [He cited *Swain v. Lewis*, 3 Dowl. 700.]

WIGHTMAN, J. In that case, the objection was taken after verdict; and then, no doubt, such intendment would be made; but the "&c." will not help you here. The *similiter* should have been added, or the plaintiff ruled to surrejoin before judgment as in case of a nonsuit was moved for.

Rule discharged; costs to be costs in the cause.

¹ 15 Jur. 880.

Brown v. Collyer.

BROWN v. COLLYER.¹

Easter Term, June 17, 1851.

Arbitration — Power of the Court to enlarge the Time for making an Award — 3 & 4 Will. 4, c. 42, s. 39.

By the 3 & 4 Will. 4, c. 42, s. 39, power is given to the court or a judge to enlarge the term for the making of an award by an arbitrator appointed by a rule of court, judge's order, order of *nisi prius*, or submission containing an agreement that the submission should be made a rule of court: —

Held, that such power of enlargement might be exercised after the arbitrator had made his award: —

Held, also, that a rule *nisi* for such enlargement, or for remitting the matters back to the arbitrator, or for entering judgment after the award, need not, in terms, be drawn up "upon reading the rule of court making the submission in the cause a rule of court," if it sufficiently appear by the affidavits that the submission has been made a rule of court.

THIS was a rule calling upon the defendant to show cause why the time for the arbitrator making his award between the parties should not be enlarged, or why the matters referred by the order of reference herein to the arbitrator should not be remitted back, in order that the arbitrator should duly enlarge the time for making his award, or why judgment should not be entered up upon the verdict taken in the cause. The rule purported to be drawn up "upon reading the affidavit of Frederic Renard, and the paper writing and copy award thereto annexed." The action, and all matters in difference between the parties, had been referred to arbitration by an order of *nisi prius* at the Summer assizes of 1849. The arbitrator was to make his award on or before the fourth day of the then next Michaelmas term, with power to enlarge the time, if necessary. He had accordingly enlarged the time for making his award until the first day of Hilary term, 1850, but the award itself was not made till the 24th of May, 1850.

Watson and *Lush* now showed cause, and took a preliminary objection, that as the rule *nisi* had not been drawn up on reading the rule of this court making the submission a rule of court, the court had no jurisdiction either to set aside or enforce the award. The rule was always drawn up upon reading the rule of court, as the court had no power to deal with such a submission except by force of a rule of court.

[*Wightman*, J. Although there is a rule of the court, you say it must be taken as not brought before me.]

Yes; there is a written document of the court, and parol evidence cannot be received of it. In *Christie v. Hamlet*, 5 Bing. 195; 2 Moo. & P. 316, the rule was brought before the court on an affidavit, and it was there said that that was not enough. But if the rule had been properly drawn up, it could not be made absolute for an enlargement

¹ 15 Jur. 881.

Brown v. Collyer.

of the time for making the award, inasmuch as, when an arbitrator had made his award, all his powers were at an end. Before the award, had been made, if the time had gone by for making it, power was given to the court, by stat. 3 & 4 Will 4, c. 42, s. 39,¹ to enlarge the time; but this had never been done after the arbitrator had actually made his award, and the matter was complete. It would be, in effect, to enlarge the time for doing a thing which was already done.

[*Wightman, J.* If I make this rule absolute for an enlargement of the time, will the award be rendered valid? or will it, notwithstanding, be totally void?]

It must still be a nullity, for the award was made after the time within which it should have been made.

[*Wightman, J.* If an application were made to this court to enforce the award, you would then object to it on the ground that it was made out of time, and my order would have no effect upon it.]

All matters in difference had been submitted to arbitration upon the condition that the award should be made within a certain time; and after that parties ought not to be compelled either to go to a fresh reference, or to submit to an award which they object to.

[*Wightman, J.* Why have you not moved to set the award aside?]

The authority given by the statute to the court to enlarge the time proceeds upon the assumption that the arbitrator has not made his award, and that the matter is still open; but here it appeared from the affidavits that the award had been made, and that the arbitrator had done all that he was required to do by the parties to the reference. This case was, therefore, not within the terms of the statute, which only recognizes a state of things still pending. Then as to the last point, that judgment should be entered up upon the verdict taken in the cause, this clearly could not be done, for the arbitrator had made an award, and that was either a nullity, or else it was binding on the parties.

Edwin James, in support of the rule, contended that the award should be remitted back to the arbitrator, so that he might enlarge the time for making it, or that the terms of the statute were sufficient to authorize the court to order an enlargement of the time in the first instance.

¹ That section enacts, that "the power and authority of any arbitrator or umpire appointed by, or in pursuance of, any rule of court, or judge's order, or order of *nisi prius*, in any action now brought, or which shall be hereafter brought, or by, or in pursuance of, any submission to reference containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall, and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the term for any such arbitrator making his award."

King v. The Rochdale Canal Company.

WIGHTMAN, J. I think that I have clearly, under the statute, the power to enlarge the time for making this award, notwithstanding the circumstance that the arbitrator has made his award out of time. I could not, in the first instance, send back the award without enlarging the time. But if I enlarge the time, and an application be afterwards made to the court to enforce the award, the question will arise whether there is such an award as can be supported, the arbitrator having made it after the time when he had power to do so. The court may then either refer it back, or hold that the subsequent enlargement related back. One of these two cases must occur — either I have power under the statute to enlarge the time after the time for making the award has expired, or my doing so is a mere nullity. I have no doubt, however, that the proper course now is for me to enlarge the time for making the award. A formal objection was taken to the rule, which is drawn up upon reading an affidavit, and two paper writings thereto annexed, one of which is the order of *nisi prius*, and the other the award itself. It is said the rule is defective in not being drawn up upon reading the rule of this court making the submission a rule of court. It appears, however, from the affidavit, that the submission was, in fact, made a rule of this court. The court has before it the order of *nisi prius*. I see from it what power the arbitrator had, and I know from the affidavit that it has been made a rule of court. In the case cited in 5 Bing., much better reported in 2 Moo. & P., the objection was, that a rule to set aside an award was drawn up without any mention of the order of *nisi prius*, and not upon reading the rule of court, so that the submission to arbitration was not before the court at all. That case is, therefore, quite distinguishable from the present. The rule must be made absolute to enlarge the time for making the award.

Rule absolute accordingly.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF QUEEN'S BENCH.]

KING v. THE ROCHDALE CANAL COMPANY.¹

Trinity Vacation, June 18, 1851.

Stat. 34 Geo. 3, c. 78, s. 113 — Violation of Act — Allegation of Damage unnecessary — Special Damage presumed after Verdict — Jurisdiction of Superior Courts.

Sect. 113 of stat. 34 Geo. 3, c. 78, which empowered a company to make and maintain a canal, enacted that it should be lawful for the owners of lands within twenty yards from the canal to make a communication between the water therein and any steam engine, by means of pipes, so constructed as to prevent leakage or waste of water, and to draw from

¹ 15 Jur. 896.

King v. The Rochdale Canal Company.

the canal such quantities of water as should be sufficient to supply the engine with cold water for the sole purpose of condensing the steam used for working such engine : provided that the proprietor of such engine shall return to the canal an equal quantity of water to that taken, on the same day and on the same level, (inevitable waste by condensing excepted,) so that no obstruction shall arise therefrom to the said navigation : provided also, that such water so taken shall be applied to the working of the said engine, and to no other use or purpose, and that every person laying pipes into the canal for such purpose shall make good the bank thereof, and repair all damages : provided, nevertheless, that no person shall take any water for the use of any engine without giving one month's notice in writing to the company, in order that they may appoint a person to inspect the premises, and to take care that the pipe is of a proper strength and thickness, and is laid into the bank in a proper manner ; and if any dispute shall arise between the company and any person who shall be desirous of taking water out of the canal for the purposes of any engine, or who shall be in the use of taking the same therefrom, such dispute shall be finally settled and determined by the commissioners appointed under the act. Sect. 23 of stat. 46 Geo. 3, c. 20, after reciting that the power of taking water for the condensing of steam in the engines near to the canal, granted by the former act, might be abused, and that it was expedient that the provision relating thereto should be explained and amended, empowered the servants of the company to enter into any building containing such steam engine, and examine whether the water was applied to any other purpose than that of condensing the steam of such engine.

Declaration in case alleged that a canal was made by plaintiffs in pursuance of stat. 34 Geo. 3, c. 78, and was maintained by them for the purposes in the act specified ; and that defendant, the owner of a steam engine, had given the notice required by stat. 113, and had laid down pipes. Breach, that defendant, having drawn off from the canal large quantities of water by means of the pipes, used and applied the same for different purposes and uses than the condensing the steam used for working the said engine, contrary to the statute. Second breach, that defendant, by means of the pipes, drew off from the canal more water than sufficient to supply the engine with cold water for the sole purpose of condensing the steam used for working the engine, contrary to the statute, whereby the navigation of the canal was greatly impeded and obstructed : —

Held, first, that the declaration sufficiently showed that plaintiffs were entitled to sue for an injury to the canal.

Secondly, that it was a violation of sect. 113 of stat. 34 Geo. 3, c. 78, as explained by sect. 23 of stat. 46 Geo. 3, c. 20, to use the water for any other purpose than the condensing the steam used for working the engine, although no more was taken than sufficient for the purpose of condensing steam ; and, therefore, the first breach was properly assigned.

Thirdly, that it was unnecessary to allege that the navigation of the canal was obstructed.

Fourthly, that if it was necessary to prove special damage, it must be presumed after verdict

Fifthly, that the concluding words of the proviso of sect. 113 of stat. 34 Geo. 3, c. 78, did not by necessary implication take away the jurisdiction of the superior courts.

JUDGMENT having been given for the plaintiffs in the Court of Queen's Bench, (see 14 Jur. 16, where the pleadings and the sections of the Rochdale Canal Acts are set forth,) the defendant brought a writ of error, which was argued before Parke, B., Alderson, B., Maule, J., Cresswell, J., Talfourd, J., and Martin, B., by

Crompton, for the plaintiff in error, (the defendant below.) The declaration does not disclose a cause of action. First, sect. 113 of stat. 34 Geo. 3, c. 78, defines the quantity of the water which may be taken by any mill owner, and requires that he shall return the same quantity, and so make up that which is wasted, but not that he shall return the same water. Other words are used in the proviso to prohibit the application of the water to any other purposes than that of condensing steam for working the engine.

[*Cresswell, J.* The license to take water from the canal is conditional. If the mill owner does not take it for the purpose of con-

King v. The Rochdale Canal Company.

densing steam for working the engine, he has no power to take it under the act.]

Then the count should be for taking the water unlawfully.

[*Parke, B.* If the mill owner takes water from the canal under a license, and uses it contrary to the license, it becomes a wrongful act *ab initio*. *Six Carpenters' Case*, 8 Rep. 146, *a.*]

No action will lie for the mere misapplication of the water so taken. Secondly, the words at the end of the enacting part of sect. 113, "so that no obstruction shall arise therefrom to the said navigation," override the whole section; and, therefore, there is no cause of action, unless special damage is alleged and proved; and the jury have negatived it. If an action is brought for an obstruction to a highway, special damage must be shown. *Dobson v. Blackmore*, 9 Q. B. 991; 11 Jur. 556. Com. Dig., "Action on the Case," B. 6. Thirdly, the declaration does not allege that the company were possessed of the canal, or of the water of the canal.

[*Parke, B.* It avers that the canal was maintained by the company for the purposes in the act specified; that is, for their own benefit. If, at the time when they were maintaining it, an act was done not permitted by the statute, that is *prima facie* actionable.]

Fourthly, the remedy of the company is by application to the commissioners, under the clause at the end of sect. 113, by which any dispute between the company and any person desirous of taking water out of the canal "shall be finally settled and determined by the said commissioners;" and a special plea to that effect would not be applicable. He cited *Tindal, C. J.*, in *Crisp v. Bunbury*, 8 Bing. 393. *Morrison v. Glover*, 4 Exch. 434. *Cutbill v. Kingdom*, 1 Exch. 494. *The Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, 859. *Stevens v. Jeacocke*, 12 Jur. 477. *Rex v. The Trustees of the Mildenhall Savings Bank*, 6 Ad. & El. 952. *Timms v. Williams*, 3 Q. B. 413; 6 Jur. 1012.]

Cowling, contra. First, sect. 113 of stat. 34 Geo. 3, c. 78, gives to the mill owners a right to take water out of the canal sufficient for condensing purposes, and to use it for those purposes — not a right to use the water which they have taken for other purposes.

[*Maule, J.* The first breach does not allege that the defendant applied the water for other and different purposes and uses than working the engine.]

Sect. 51 shows the restriction intended to be imposed by the legislature upon the power of taking and using the water of the canal by the mill owners.

[*Maule, J.* That is an obscure section.]

The words "for working the mills" must be read as if the words "as aforesaid" were added; and the words "which shall be necessary for the mills" must mean "for working the mills." (He also referred to sect. 23 of stat. 46 Geo. 3, c. 20.)

[*Parke, B.* It is difficult to see how the company can have any redress for the misappropriation of water taken rightfully from the canal, except by action; sect. 23 of stat. 46 Geo. 3, c. 20, does not give any.]

King v. The Rochdale Canal Company.

He was then stopped.

Crompton, in reply. The provisions of sect. 113 of stat. 34 Geo. 3, c. 78, are shaped with a view to prevent water from being taken out of the canal for improper purposes, independently of working the engines. Sect. 33 of stat. 46 Geo. 3, c. 20, does not give rights which the company had not before the former statute; and the object of it was to prevent an abuse of the power of taking water.

PARKE, B., delivered the judgment of the court. We are all of opinion that the judgment of the Court of Queen's Bench should be affirmed.

The first objection to the declaration, viz., that it contains no averment that the plaintiffs were in possession of the canal, so as to entitle them to bring the action, was not so much insisted upon as the second objection; and we think that the declaration does sufficiently show the right of the plaintiffs to complain, and that they are in possession of the canal made under the act of Parliament, which empowered them to construct and maintain the canal, and to receive tolls from persons using it. It is alleged that the plaintiffs are proprietors of the canal, and that the canal was made by them in pursuance of the act, and was maintained by them for the purposes specified in the act. Therefore, it must be assumed that they are in the enjoyment of all the rights conferred by the legislature in relation to the canal, and in possession of the canal, and entitled to sue.

The next question is, whether the first breach is properly assigned. That breach is, "that although divers large quantities of water were drawn off from the canal through and by means of the said pipes, which said water the defendant ought to have used for the sole purpose of condensing the steam used for the working of the said engines, nevertheless the defendant wrongfully used and applied the same for different purposes and uses than the condensing the steam used for the working the said engines." The question is, whether the power given by sect. 113 of stat. 34 Geo. 3, c. 78, enables the defendant to use water which he takes from the canal for any other purpose than that of condensing the steam, although no more is taken than sufficient for the purpose of condensing steam; and if that question turned upon sect. 113 alone, all the members of the court are not satisfied that the defendant might not have taken water for the purpose of generating steam for working the engine, if no greater quantity was taken than was sufficient for condensing the steam. My own impression, upon reading that section by itself, is, that the defendant is prohibited from using the water except for the purpose of working the engine in the way of condensing the steam; and if that is the meaning of the section, the first breach is properly assigned. But all doubt entertained by any members of the court upon that subject is entirely removed by sect. 23 of the second act of Parliament, (46 Geo. 3, c. 20,) which recites that the power of taking water for the purpose of condensing steam in the engines near to the canal

King v. The Rochdale Canal Company.

granted by stat. 34 Geo. 3, c. 78, may be abused, and that it is expedient to explain and amend the provision relating thereto; because, looking at the explanation which is there given of that provision, it treats the power granted by the former statute as a power of taking water only for the purpose of condensing steam, and not as a power of taking only so much water as is required for that purpose, and of using it for other purposes. Accordingly, it empowers the agents or servants of the company, upon depositing 20*l.* in the hands of a justice of the peace, to enter into any building containing a steam engine, in order to examine whether the water is applied to any other purpose than that of condensing the steam of such engine; and if it is found that the water is applied to any other purpose, then the 20*l.* is to be returned to the company; and if not, the expenses of the mill owners are to be paid out of it, and the residue only returned to the company; but no remedy is given to the company by the act of Parliament in case of a violation of it, and, therefore, the remedy for any injury done to the company by an infringement of it must be by bringing an action. Therefore, sect. 23 of stat. 46 Geo. 3, c. 20, which was enacted for the purpose of amending the provision in the former statute, explains the act done by the defendant to be a breach of duty contrary to the authority of that statute, though it is connected with the working of the defendant's mill.

Then arises the question, whether the company can maintain an action for this infringement of the statute if no actual injury is sustained from it. It is said that the action is maintainable only if the navigation of the canal was thereby obstructed; and reference is made to the following proviso of sect. 113 of stat. 34 Geo. 3, c. 78: "Provided always, that the proprietor of every such engine shall return to the said canal and cuts, or some of them, in every day on which he shall use such engine, a quantity of water on the same level on which it shall be taken, equal to the quantity so taken in every such day from the said canal and cuts, or any of them, (the inevitable waste thereof, by condensing such steam, only excepted,) *so that no obstruction shall arise therefrom to the said navigation.*" But we are of opinion that the latter words are to be confined to the last preceding part of the proviso, which obliges the mill owners, when they take water for condensing the steam, to return to the canal, on the same day and on the same level, a quantity equal to that taken; and that it does not apply to the earlier part of the section, which provides for the application of the water to "the sole purpose of condensing the steam." The words, "*so that no obstruction shall arise therefrom to the said navigation,*" may be merely an explanation of the enactment requiring a return of the water on the same day. The limits assigned for drawing water from the canal are, the return of an equal quantity to that taken, and on the same level; and further, so as to do no damage to the navigation. Therefore, we think it was unnecessary to allege that the navigation of the canal was injured or obstructed by the improper use of the water.

The next question is, whether it was necessary to prove special damage. The principle in *Ashby v. White*, 1 Bro. P. C. 62, is, that

King v. The Rochdale Canal Company.

for a wrong done, or for an injury to a right, an action is maintainable, although no particular damage be shown. But no question can well be raised upon that point, because at the end of the declaration there is a general allegation, whereby the navigation of the said canal has been greatly impeded and obstructed; and if it be necessary, we must presume, after verdict, that special damage was proved.

The only remaining question is, whether in this case the jurisdiction of the superior courts is taken away. Now, the rule of law is, that the jurisdiction of the superior courts cannot be taken away except by express words or necessary implication. Here the statute certainly contains no express words for that purpose; and the only question is, whether, by necessary implication from the words used, it results that the legislature must have intended to take away the jurisdiction of the superior courts. We agree in the opinion of the Court of Queen's Bench, that it by no means appears that such a necessary implication arises from the introduction of the words at the end of sect. 113. We must look to other parts of that section; and the proviso in connection with which those words are found is as follows: "Provided, nevertheless, that no person shall take any water from the said canal or cuts, or any of them, for the use of any such engine, without giving one month's previous notice in writing of such his intention to the committee of the said company of proprietors, in order that the said committee may appoint a person or persons to inspect into the premises on their behalf, and to take care that the said pipe is of a proper strength and thickness, and is laid into the said bank in a proper manner, according to the true intent and meaning of this act; and if any dispute shall arise between the said company of proprietors or the said committee and any person who shall be desirous of taking water out of the said canal or cuts, or any of them, for the purposes of any such engines,"—so far the section relates only to the dimensions of the pipe and the manner of laying it down into the bank, and to any dispute respecting those matters; but the doubt arises from the subsequent words,—"*or who shall be in the use of taking the same therefrom*, such dispute shall be finally settled and determined by the said commissioners." We, however, think that those words were introduced to apply to the case where a person, without giving the required notice of his intention to take the water, has laid down a pipe of improper dimensions, or neglected to repair the banks properly, and not to persons who have violated the statute by a misappropriation of the water; and they are also satisfied by an application to disputes with persons either about to exercise the power, or commencing the exercise of it lawfully. We are, therefore, clearly of opinion that the words do not by necessary implication, in every case, take away the jurisdiction of the superior courts.

Judgment affirmed.

Moseley v. Hide & another.

MOSELEY v. HIDE & another.¹

Easter Vacation, May 13, 1851.

Sale of Estate — Conditions — Power to Convey — Right to recover a Deposit.

Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: "And there being three children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children, who were minors, and they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children:—

Held, that neither the children of Mrs. C. nor the trustees had legal capacity to join in a conveyance, and, therefore, a purchaser was entitled to recover the deposit.

ASSUMPSIT for money had and received, with counts for interest, and upon an account stated.

Plea — *Non assumpsit*.

On the trial, before Patteson, J., at the Spring assizes for Staffordshire, it appeared that the action was brought to recover 492*l.*, the amount of a deposit made by the plaintiff on a sale by auction of an estate by the defendants, who were trustees of the marriage settlement of Mrs. Judith Chawnor, to whose use the estate was limited for life, with remainder to trustees, in trust to sell for the benefit of her children. The fourteenth condition of sale, after stating the fact of the estate being so settled, proceeded as follows: "And there being three such children only, all of whom have attained the age of twenty-one, such children, or their trustees or assigns, &c., shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. Chawnor." Two of the children of Mrs. Chawnor were married women, having children who were minors, and they had settled their portion of the money to arise from the sale of the estate, in trust for themselves for life, with remainder to their children. It was contended for the plaintiff that a sale of the estate could not be made in the lifetime of Mrs. Chawnor. The defendants applied for a nonsuit, on the ground that the purchasers were precluded from taking the above objection by the fourteenth condition. The learned judge held, that the condition must be construed as entire, and that, as the defendants were not in a position to join in the conveyance, there was a breach of the condition, and, therefore, the plaintiff was entitled to recover. A verdict was accordingly entered for the plaintiff for 492*l.* In the following Easter term, April 23,—

Whateley obtained a rule *nisi* for a new trial, on the ground of misdirection; citing *Corrall v. Cattell*, 4 M. & W. 734; against which,

¹ 15 Jur. 899.

Moseley v. Hide & another.

Alexander, Peacock, and Phipson now showed cause. The defendants could not make a good title under the fourteenth condition of sale, as neither they nor the grandchildren of Mrs. Chawnor could join in the conveyance.

Whateley, Keating, and Gray, contra. The condition would be nugatory if the vendors could make a good title. Further, the objection can only be taken in a court of equity. [As to the construction of the condition, they cited Lord Brougham, C., in *Thornhill v. Hall*, 2 Cl. & Fin. 22, 36.]

LORD CAMPBELL, C. J. I am of opinion that the view which my brother Patteson took at the trial was perfectly sound, and I concur in what he then ruled. A purchaser may be contented with a bad title, or with no title; and the question is, for what title the plaintiff has stipulated. As to the objection that the property ought not to have been sold until the death of Judith Chawnor, the fourteenth condition of sale discloses that the sale was about to take place during the life of the tenant for life, and stipulates that no objection should be made on that ground. [His lordship read the condition.] But then the question is, What is the meaning of the words, "such children, or their trustees or assigns, shall, if required, join in the conveyance to the purchaser"? It was contended that it was enough if the trustees, without having the power to convey, were willing to execute the conveyance. But I think the meaning is, that they should join effectually; that is, that they should have a title to join. It turns out that they cannot join without a breach of trust, and, therefore, they cannot join in the sense stipulated for, and the purchaser has not got the title for which he contracted.

PATTESON, J. I had a strong opinion upon this case at the trial, and that opinion is now strongly confirmed. The sale of the estate was by trustees under a marriage settlement; the estate itself was not settled on any persons after the life of Mrs. Chawnor, but the proceeds of the sale were settled upon her children. The trustees, therefore, could make a good title, notwithstanding the children might not concur in the sale. Then, it being proposed to sell in the lifetime of Mrs. Chawnor, the conditions of sale disclose that fact, and that Mrs. Chawnor had three children, all of whom were under age, but say nothing about their being married women, or of their having upon their marriage settled their interest in the proceeds of the estate upon their children, or of their having children. Still, if the condition had stopped there, the purchaser would have been considered to have taken the risk upon himself; but it goes on to say, that the children of Mrs. Chawnor, or their trustees, shall, if required by the purchaser, join in the conveyance. I think that amounts to a warranty that all persons who might be prejudiced by a sale in the lifetime of the tenant for life should join, and involves a statement that the children were in a capacity to join, in the conveyance if required; their incapacity to do so being a fact known to the vendors, and not

Doe v. Challis.

to the purchaser. If this construction makes the latter part of the condition inoperative, it is the fault of the vendors; but if the latter part is to stand, I do not understand what the meaning of the earlier part is, unless it is tantamount to a warranty that the persons named in it should join, and be in a capacity to do so.

WIGHTMAN, J. This is a very clear case. Upon the death of Mrs. Chawnor, the trustees would have been entitled to sell. But the estate being put up to sale in her lifetime, there was an obvious defect in the title; and it is not probable that, in the face of such a defect, a purchaser would be found. Therefore, the trustees enter into a condition that the children shall, if required, join in the conveyance to the purchaser; and that condition, if complied with, would render the purchaser safe. It is said, that the only objection taken at the trial was, that the sale could not be made in the lifetime of Mrs. Chawnor; but that is of no avail to the defendants. The objection now taken is hardly an objection made to the title of the vendors; it is rather an insisting by the purchaser upon a condition which the vendors entered into with him, and which they have not complied with.¹

Rule discharged.

DOE v. CHALLIS.²

Trinity Term, May 30, 1851.

Ejectment — Action for Mesne Profits — Consent Rule — Estoppel.

In an action for mesne profits, after judgment in ejectment for the lessor of the plaintiff, it appeared that the defendant had been made defendant in the ejectment, under sect. 13 of stat. 11 Geo. 2, c. 19, upon entering into the consent rule as mortgagee and landlord:—

Held, that defendant was concluded by the consent rule from denying that he was landlord.

ACTION for mesne profits against the defendant, who had entered into a consent rule to defend, as landlord, for the entirety of the premises for which the ejectment was brought, in which ejectment the lessor of the plaintiff recovered judgment for one twelfth of the whole. (See 15 Jur. 601, 2 Eng. Rep. 215.) The consent rule was dated the 9th of June, 1849, and was as follows:—

"Doe v. Roe.

"It is ordered, by the consent of the attorneys of both parties, that Thomas Challis, the mortgagee and landlord of the tenants in possession of the premises in question in this cause, be made defendant in the stead of the now defendant Roe, and do forthwith appear, at the suit of the plaintiff, and receive a declaration in an action of trespass and ejectment for the premises in question, which premises

¹ ERLE, J., was in the Bail Court; COLERIDGE, J., being absent on account of indisposition.

² 15 Jur. 900.

Doe v. Challis.

he, the said Thomas Challis, hereby admits to be, or consist of, &c., and now in the possession or occupation of, &c., for which he intends, as mortgagee and landlord thereof, to defend this action of trespass and ejectment." [It proceeded in the common form.]

On the trial, before Erle, J., at the Middlesex sittings after Easter term, it appeared that, in 1849, John Dolley had mortgaged the premises in question to the defendant. There was a receiver of rents, who before, and subsequent to, the mortgage, received the rents in the name of Dolley, Bligh, and others, and paid them into the banking-house of the defendant in thirds, as follows: One third to the account of John Dolley; one third to the account of Dolley Ward, and others, *cestuis que trust*; and one third for those who should be interested under the name of the "unknown account." There was a claim for rents before, and subsequent to, the mortgage, on the ground that the mortgagee was in possession; but the lessor of the plaintiff abandoned the claim for rents accrued due before the consent rule, and relied on the consent rule as estopping the defendant from showing that he was simply mortgagee not in possession from the time when he entered into the consent rule. The counsel for the defendant proposed to show that the defendant had not received any profits; but the learned judge held, that the defendant, by entering into the consent rule, had admitted his possession as landlord, and that, as mortgagee, he had received one third of the profits to the use of those who should be held entitled to receive the profits. A verdict was entered for the plaintiff for 30*l.*, which was one third of the rents, leave being reserved to move to enter a verdict for the defendant, or a nonsuit.

Hoggins now moved accordingly. Though there is a *prima facie* case against the defendant in ejectment, it is competent for him to show how he defends. If the defendant is estopped, it must be by the terms of the consent rule. *Doe d. Fellowes v. Alford*, 1 Dowl. & L. 470. But there is nothing in the terms of the consent rule to extend the estoppel to an action for mesne profits — it is confined to the trial of the issue in the ejectment.

[*Lord Campbell*, C. J. Must not the consent rule be conclusive evidence that the defendant was in possession and a trespasser at the time when judgment was recovered in ejectment?

Coleridge, J. Suppose the consent rule was pleaded in an action for mesne profits? In *Doe v. Wright*, 10 Ad. & El. 763, it was held, that a replication by way of estoppel, that the plaintiff commenced an action for recovery of the same premises on certain demises, and had judgment to recover his said terms, was good on general demurrer.

Lord Campbell, C. J. That case shows that the former judgment might be taken advantage of.]

In that case the mortgagor was insolvent, and could not defend. The defendant, being mortgagee, is a remainder-man; and the action for mesne profits should be against the person in actual possession, viz., the mortgagor. The defendant might be sued for six years' profits.

Doe v. Challis.

[*Lord Campbell*, C. J. The plaintiff can only go back to the day of the demise in the declaration.

Coleridge, J. If the plaintiff seeks to go back beyond that, he must prove his case by parol evidence; he must prove his title.

Lord Campbell, C. J. Rent in arrear may be recovered in an action of ejectment.]

This objection has never before been raised by a person not in possession who has come in under sect. 13 of stat. 11 Geo. 2, c. 19. The consent rule only states that the defendant was admitted to defend as landlord and mortgagee; the plaintiff should have moved to strike out the latter word.

[*Patteson*, J. In *Doe v. Harlow*, 12 Ad. & El. 40, it was held, that a verdict might be found against the defendant, though he never actually occupied during the time of the trespass, if before the trespass the defendant underlet, and after his interest became determined, and right of possession vested in the plaintiff, he received rent from his under lessee, who continued in possession, and declared him to be his tenant when the plaintiff demanded possession.]

The evidence afforded by the consent rule is answered by the evidence, on the part of the defendant, that he was mortgagee only from 1849.

[*Lord Campbell*, C. J. Does not the defendant, by entering into the consent rule, admit that the person who is served with the declaration is his tenant? otherwise the lessor of the plaintiff loses his remedy. If, when a declaration in ejectment has been delivered to the tenant, another person comes in, and says that he is the landlord, it is not unfair that he should be held liable for the mesne profits.]

Then the mortgagee and any other remainder-man would be precluded from coming in and contesting the title. Judgment is signed against the tenant in possession.

[*Coleridge*, J. His name is struck out of the consent rule; the landlord comes in in his place.]

LORD CAMPBELL, C. J. For the reasons which I have thrown out in the course of the argument, I think that there should be no rule in this case.

PATTESON, J. The argument for the defendant is placed on the presence of the word "mortgagee" in the consent rule; but the essential part of the consent rule is, that the party intends to defend as landlord. Sect. 13 of stat. 11 Geo. 2, c. 19, does not permit a party to defend as mortgagee, but as landlord; and, therefore, the defendant, who has entered into the consent rule, is in the same position as tenant.

COLERIDGE, J. Suppose a declaration in ejectment was served on the tenant in possession, the lessor of the plaintiff would have a right to go on with the action; and the defendant, having entered into the consent rule, cannot controvert that he is landlord. Formerly the

Doe v. Challis.

consent rule did not state the possession; and at the end of the trial the lessor of the plaintiff failed because he did not prove possession. To obviate that failure, the terms of the consent rule were altered by introducing a statement of the possession. If the consent rule is conclusive as to the person served with the declaration in ejectment, it must be so as to the person let in to defend as landlord; otherwise the party who had entered into the consent rule might turn the lessor of the plaintiff round upon the objection, that possession was not proved, which would be doing gross injustice.

ERLE, J. The question is, whether the consent rule is evidence binding upon the defendant down to the time when judgment in ejectment was executed, it having turned out in this case that the lessor of the plaintiff is the party entitled to one twelfth of the premises. The defendant came forward, and said, "I claim the right, which the law allows, to come in and defend as landlord; and I admit, for the purpose of this action, that the party served with the declaration is my tenant;" and by entering into the consent rule, containing this admission, he keeps the claimant of the property out of possession until the question of title is tried. The statement, that the party intends to defend as mortgagee as well as landlord, does not alter the effect of the consent rule. The defendant is concluded from denying that he was landlord, because, during the pendency of the suit, he asserted that he was landlord, and had the benefit of appearing in that character; and when the opposite party seeks to take a corresponding benefit, the defendant is concluded from denying that fact, upon the principle established in *Pickard v. Sears*, 6 Ad. & El. 469; *Gregg v. Wells*, 10 Ad. & El. 90; 3 Jur. 555; and other cases. The doctrine in *Aslin v. Parkin*, 2 Burr. 665, 668, in which it was decided that an action for mesne profits lies after judgment by default, applies to the effect of a judgment in the action of ejectment upon the defendant: it is said by Lord Mansfield that the lessor of the plaintiff and the defendant are substantially and in truth the only parties to the suit, and that an action for the mesne profits is consequential to the recovery in ejectment, and is equally the action of the lessor of the plaintiff. I also distinguish that case from those which have occurred since the alteration in the terms of the consent rule by introducing the statement of possession. The defendant, by entering into the consent rule, is just as much estopped from denying his possession as he would be by an estoppel in law.

As to the value, the consent rule would not prove it; and in this case, evidence was given that one third of the rents were in the hands of the defendant; therefore, the value of 30*l.* was properly assessed.

Rule refused.

Regina v. Hellier.

REGINA v. HELLIER.¹

Trinity Term, May 31, 1851.

Conviction — Appeal — Order to pay Costs — Acquiescence — Removal by Certiorari.

By sect. 29 of stat. 9 Geo. 4, c. 61, where the judgment of any justice in or concerning the execution of that act shall be affirmed on appeal, the court to whom such appeal is made shall order the appellant to pay costs to the justice; and if he shall refuse or neglect forthwith to pay the same, it shall be lawful for the court to order that he be committed to jail until the same be paid. By sect. 27 of stat. 11 & 12 Vict. c. 43, if, upon appeal from any conviction or order, the Court of Quarter Sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and, if the same shall not be paid, any justice may enforce payment by warrant of distress: and, in default of distress, may commit the party for three months. Sect. 36 repealed all acts and parts of acts inconsistent with the provisions of that act:—

Held, that sect. 27 of stat. 11 & 12 Vict. c. 43, applied to all summary convictions and orders of justices, (except those specified in sect. 35,) and orders of Quarter Sessions made on appeal from them; and that sect. 29 of stat. 9 Geo. 4, c. 61, which was inconsistent with it, was repealed by it and by sect. 36.

A conviction of defendant under stat. 9 Geo. 4, c. 61, was affirmed on appeal at the October Quarter Sessions, 1850, and he was ordered to pay costs to the justices, amounting to 20*l*. In November, defendant paid 10*l*. on account. On the 8th of February, 1851, the justices removed the order into this court under sect. 18 of stat. 12 & 13 Vict. c. 45, for the purpose of enforcing payment of the residue. On the 21st of February, defendant applied to a judge at chambers to stay proceedings on the order, which was refused; and on the 1st of March, a writ of *fi. fa.* was issued upon the order. In Easter term, defendant obtained a rule for setting aside the order and the *fi. fa.*:—

Held, first, that there had not been acquiescence in the order, nor laches in objecting to it by defendant, inasmuch as by sect. 34 of stat. 9 Geo. 4, c. 61, he could not remove the order by *certiorari*.

Secondly, that the order being removed into this court for the purpose of being enforced, it was competent to defendant to object to the illegality of it, though he could not have removed it by *certiorari*; and the court made the rule absolute, and ordered the money levied under the *fi. fa.* to be returned.

RULE to show cause why a conviction of the defendant, under sect. 29 of stat. 9 Geo. 4, c. 61, "An Act to regulate the granting of Licenses to Keepers of Inns, Alehouses, and Victualling Houses in England," and an order of Quarter Sessions, by which an appeal of the defendant against that conviction was dismissed, and the defendant was adjudged to pay costs to the three justices who had convicted him, and an order of this court removing the order of Quarter Sessions, and a writ of *fi. fa.* issued thereon, should not be set aside, and why the money levied should not be returned to the defendant. It appeared, from the affidavits, that the defendant was convicted on the 30th of July, 1850. On appeal at the Quarter Sessions on the 15th of October following, the sessions confirmed the conviction, on the ground of the insufficiency of the notice of appeal, and made an order in pursuance of sect. 29, by which the defendant was ordered to pay the justices their costs, amounting to 20*l*. On

¹ 15 Jur. 901.

Regina v. Hellier.

the 19th of November, the defendant paid 10*l.* on account, under protest. The residue remaining unpaid on the 8th of February, 1851, the justices caused the order of Quarter Sessions to be removed into this court by an order of a judge, under sect. 18 of stat. 12 & 13 Vict. c. 45, by which, in all cases where any order shall be made by any court of Quarter Sessions, it shall be lawful for the Court of Queen's Bench, or for any judge of that court, upon the application of any person entitled to enforce such order, and upon proof of refusal or neglect to obey such order, to order and direct such order to be removed into the said Court of Queen's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner, as a rule made by the said Court of Queen's Bench; and all the reasonable costs and charges attendant upon such application and removal shall be recoverable in like manner as if the same were part of such order. The costs of bringing up the order were taxed in February, and the taxation of costs was attended by the defendant's attorney. On the 1st of March, a writ of *fi. fa.* was issued upon the order, as well for the balance as for the costs, together amounting to 14*l.*, which were levied on the 3d of March. On the 21st of February, application was made to a judge at chambers to stay proceedings on the order; but that application was refused, and on the 9th of May this rule was obtained.

Butt and *Ffooks* showed cause. First, assuming the order is bad in substance, this is not a proceeding to obtain any thing under the conviction. The defendant could not have removed the order, because, by sect. 34 of stat. 9 Geo. 4, c. 61, no conviction, nor any adjudication made on appeal therefrom, shall be removed by *certiorari*; and this is an attempt to do indirectly what the defendant could not do directly. Further, this application is too late, and there has been an acquiescence in the order by the defendant. The defendant suffered Michaelmas and Hilary terms to pass without taking any proceedings to set aside the order, or making any objection to it, and he paid 10*l.* on account.

[*Coleridge, J.* The bringing up the order was *ex parte*; and this objection was not available before the master on the taxation of costs.

Erle, J. There was no way open to the defendant to question the order. How could he move to quash the order, when he could not remove it or the conviction by *certiorari*? And how can the defendant be prejudiced by the delay of the justices in bringing up the order for the purpose of enforcing it until it suited their convenience?]

The defendant might have refused to pay any part of the costs.

[*Erle, J.* That payment cannot be said to have been voluntary, because the defendant might have been committed to prison for default of payment.

Patteson, J. There was no acquiescence by the defendant in the order, because, before the levy of the costs under it, and as soon as he was aware of the order having been brought up, he applied to a judge at chambers to stay proceedings on it.]

Regina v. Heller.

Secondly, there is no ground for this objection. The enactment in sect. 27 of stat. 11 & 12 Vict. c. 43,¹ relating to summary convictions and orders of justices out of sessions, does not impliedly repeal sect. 29 of stat. 9 Geo. 4, c. 61,² which creates a special machinery for enforcing the payment of the costs of the justices in respect of convictions under that particular statute. It must be contended on the other side, that, since stat. 11 & 12 Vict. c. 43, no order can be made for the payment of costs except to the clerk of the peace, and that no order can be made for the immediate payment of costs. Again: sect. 18 of stat. 12 & 13 Vict. c. 45, provides for the mode of enforcing orders of Quarter Sessions "in all cases," and, therefore, overrides both the former statutes; and it contains words which make the order good.

[*Coleridge, J.* Then an order, however bad on the face of it, may be enforced.]

The order may have been made under sect. 27 of stat. 11 & 12 Vict. c. 43. The term "forthwith" means "within a reasonable time;" and, therefore, answers the requirement of that enactment.

[*Coleridge, J.* The term "forthwith" limits the time within which

¹ By sect. 27 of stat. 11 & 12 Vict. c. 43, "After an appeal against any such conviction or order as aforesaid shall be decided, if the same shall be decided in favor of the respondents, the justice or justices who made such conviction or order, or any other justice of the peace of the same county, riding, division, liberty, city, borough, or place, may issue such warrant of distress or commitment as aforesaid for execution of the same as if no such appeal had been brought; and if upon any such appeal the Court of Quarter Sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by a recognizance conditioned to pay such costs, such clerk of the peace or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of 1s., shall grant to the party so applying a certificate that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, &c., it shall be lawful for him or them to enforce the payment of such costs by warrant of distress, in manner aforesaid; and, in default of distress, he or they may commit the party against whom such warrant shall have issued, in manner hereinbefore mentioned, for any time not exceeding three calendar months, unless the amount of such costs, and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such justice or justices shall think fit so to order, (the amount thereof being ascertained and stated in such commitment,) shall be sooner paid."

² By sect. 29 of stat. 9 Geo. 4, c. 61, "In every case where notice of appeal against the judgment of any justice in, or concerning, the execution of this act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to be made, and such court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum, by way of costs, as shall, in the opinion of such court, be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having served upon him notice of the intention of such party to appeal; and if such party shall refuse or neglect forthwith to pay such sum, it shall be lawful for the said court to adjudge and order that the party so refusing or neglecting shall be committed to the common jail or house of correction, there to remain until such sum be paid."

Regina v. Helliér.

the costs should be paid. Would it be enough to direct that the costs should be paid within a reasonable time? Further, the order, if made under sect. 27 of stat. 11 & 12 Vict. c. 43, ought to have expressed that the costs should be paid to the clerk of the peace; it is clear that it was made under sect. 29 of stat. 9 Geo. 4, c. 61.]

If the order is bad in part, it is not bad altogether. *Ex parte Coley*, 15 Jur. 128, 2 Eng. Rep. 282.

Peacock, (*Pashley* was with him,) contra.

[*Coleridge*, J. We think that the objection of delay in objecting to the order of Quarter Sessions has no weight.]

Then the justices would have been liable to an action of trespass for false imprisonment if the order had been enforced by committal. Sect. 18 of stat. 12 & 13 Vict. c. 45, must have been intended to apply only to valid orders. The preamble of stat. 11 & 12 Vict. c. 43, recites, that "it would conduce to the improvement of the administration of justice, so far as respects summary convictions and orders to be made by justices of the peace therein, if the several statutes and parts of statutes relating to the duties of such justices in respect of such summary convictions and orders were consolidated, with such additions and alterations as may be deemed necessary." It was intended that the 27th section should apply to all summary convictions and orders, and that the costs given under them should all, as to the mode of payment and mode of enforcing payment, be subject to one general rule. Under sect. 29 of stat. 9 Geo. 4, c. 61, the imprisonment was to be until the costs were paid; whereas, by sect. 27 of stat. 11 & 12 Vict. c. 43, no person is to be imprisoned, in default of payment, for more than three months. The 29th section of stat. 9 Geo. 4, c. 61, is inconsistent with sect. 27 of stat. 11 & 12 Vict. c. 43, because it allows the party to be imprisoned for a longer time, and without previous inquiry whether there is sufficient distress; and further, it gives the justices no discretion as to the time within which they should order the costs to be paid; they must order them to be paid forthwith.

[*Coleridge*, J. That appears also from the form of the order given in schedule (I. 2) to the statute, which recites the order of sessions.]

Sect. 27 applies to all cases in which the Quarter Sessions have power to give costs; they have no general authority to give costs, but only under particular acts. The direction is, that the costs should be paid to the clerk of the peace, in order that the party may know where he is to go to pay the costs. An order to pay the costs within a reasonable time would be very inconvenient.

[*Coleridge*, J. Sect. 35 of stat. 11 & 12 Vict. c. 43, specifies certain warrants or orders to which the act shall not extend; and this order is not one of them. Sect. 36 repeals all acts and parts of acts inconsistent with the provisions of that act. So that sect. 35 does not exclude this order, and sect. 36 uses words which would include it. You would be satisfied with having the *fi. fa.* set aside, and the money levied under it returned, and that no further proceedings should be taken.]

The 10*l*. paid under protest, also, ought to be returned. [He was then stopped.]

PATTESON, J. The order of sessions is rightly brought up, and the order of my brother Erle for removing it cannot be objected to, because, whatever order is made by the Quarter Sessions may be brought up for the purpose of being enforced. The words of sect. 18 of stat. 12 & 13 Vict. c. 45, are, that the order may be removed "upon the application of any person entitled to enforce such order;" but that must mean a person *prima facie* entitled.

The question of the validity of the order of sessions arises upon the steps taken to enforce it. Though the party affected by the order cannot remove it by *certiorari*, because that remedy is expressly taken away by sect. 34 of stat. 9 Geo. 4, c. 61, yet if it is brought up by the other party, and an application is made to enforce it, it is competent to the party affected by it to object to an illegality appearing on the face of it, and this court ought to set aside the proceedings taken for the purpose of enforcing it. The order of sessions is founded upon sect. 29 of stat. 9 Geo. 4, c. 61, and if that enactment was still in force the order would be valid, because it follows the terms of the section, though the consequence might be that the defendant would be imprisoned for life. Then the question is, whether the 27th and 36th sections of stat. 11 & 12 Vict. c. 43, have repealed sect. 29 of stat. 9 Geo. 4, c. 61. I think that they must be taken to have done so, because the intention of the legislature was to make a general uniform rule in all cases of convictions and orders of magistrates exercising summary jurisdiction, and orders of sessions made on appeal from them. Sect. 27 begins thus: "After an appeal against any such conviction or order as aforesaid shall be decided;" and I was at first somewhat puzzled by the word "such;" if it refers only to the cases mentioned in the preamble to sect. 22, in which the justice is authorized by the act of Parliament to issue a warrant of distress, but no further remedy is thereby provided in case no sufficient distress is found, then stat. 11 & 12 Vict. c. 43, does not apply; but the present case is not any one of the cases there mentioned, because sect. 29 of stat. 9 Geo. 4, c. 61, provides a remedy by commitment of the party if the costs are not paid. And upon looking further into the 27th section, I think it includes all summary convictions and orders. That section expressly provides that the order of sessions shall direct the costs to be paid, in the first instance, to the clerk of the peace, to be paid over by him to the party entitled to them, and on a day to be specified in the order, not forthwith, as under sect. 29 of stat. 9 Geo. 4, c. 61. Then we come to sect. 36 of stat. 11 & 12 Vict. c. 43, which repeals many statutes, naming them by their title, "and all other act or acts, or parts of acts, which are inconsistent with the provisions of this act;" one of the provisions of that statute being, that if costs are given to the respondent, they are to be paid within a certain time to the clerk of the peace, which is very inconsistent with the provision in sect. 29 of stat. 9 Geo. 4, c. 61, for payment of the costs forthwith to the respondent, and that in case of non-payment the offender

Regina v. Hellier.

should be committed to prison, there to remain until they be paid. That being so, the section under which this order was made is repealed, and the order is invalid; though I do not wonder that the invalidity of it was not perceived at Quarter Sessions.

The only remaining question is, whether the defendant is too late in taking the objection, or cannot now be heard. Only one thing has been done which affords any reason for that objection, and that is the payment of 10*l.* on account of the costs in November. The payment of 14*l.* under the writ of *fi. fa.* could not be avoided; the party applied to me, but I thought that I could not help him; and he has not been guilty of any laches in not objecting to the *fi. fa.* As to the payment of 10*l.*, he is not estopped by it, because it was made under an order of the Quarter Sessions, which directed that if he did not pay he should be imprisoned; and he cannot be supposed to know the law so well as to be estopped from contending that the order was unauthorized, when the rest of it is sought to be enforced. But we can only say that the *fi. fa.* is to be set aside, and that the rule, so far, should be made absolute; and if money has been levied under the writ, it should be returned; and there should be an undertaking by the defendant not to bring an action.

COLERIDGE, J. If the objection to the order of sessions is available in law, it certainly is available in point of time; and there has been no laches in the party taking the objection. He is now at liberty to take an objection to the order, because he could not bring it up by *certiorari*. Suppose the only mode of enforcing the order was by a rule to show cause why the writ of *fi. fa.* should not issue; can it be contended that good cause would not be shown, if it was made to appear that the order was bad upon the face of it? This court would certainly refuse to issue a *fi. fa.* on an invalid order; and if a *fi. fa.* had been obtained *ex parte*, it would recall it. If so, it is clear that the objection may be taken by original application. Justice requires that, if the court has inadvertently lent its aid to enforce an illegal order, it should revoke it. Suppose the sessions were indiscreet in imposing an extravagant fine, would this court enforce the order? Besides, sect. 18 of stat. 12 & 13 Vict. c. 45, cannot have been intended to apply to a bad order.

Then the question is, whether the objection taken to the order of sessions is a good one. I think that it is. I look upon sect. 27 of stat. 11 & 12 Vict. c. 43, as a consolidation of all previous enactments, and as making a general rule as to orders of justices out of sessions, and proceedings in Quarter Sessions upon such orders. When the order of Quarter Sessions on appeal imposes costs upon the appellant, instead of various provisions in different acts of Parliament as to the time of payment and mode of enforcing it, for instance, within some limited time, information of which was to be communicated to the party on the face of the order, and imprisonment until they were paid, sect. 27 of stat. 11 & 12 Vict. c. 43, prescribes a uniform practice. The provisions of that section, and sect. 29 of stat. 9 Geo. 4, c. 61, are, in these and other points, inconsistent one with the

Regina v. The York, Newcastle, and Berwick Railway Company.

other; and there is an express clause, sect. 36 of stat. 11 & 12 Vict. c. 43, repealing all other acts or parts of acts inconsistent with it, and therefore, both impliedly and expressly, the provision in the earlier statute is repealed by the latter.

ERLE, J. I think that the appellant has taken the objection to the order of sessions promptly enough; he had no power to bring the matter before this court, but as soon as the order was removed by the other side, he lost no time in making this application.

Also, I think that the 29th section of stat. 9 Geo. 4, c. 61, is repealed by sect. 27 of stat. 11 & 12 Vict. c. 43; instead of a power to order costs to be paid to the respondent, a power is given to order costs to be paid to the clerk of the peace; and instead of payment forthwith, the order of sessions must specify a time within which they are to be paid; and in default of payment and of sufficient distress, the appellant can only be sentenced to imprisonment for three months, instead of until the money is paid, which might subject him to perpetual imprisonment. All the provisions of the two statutes relating to this matter are inconsistent, and therefore, by sect. 36 of the latter statute, there is an express repeal of the provisions in the earlier statute. Therefore the order of sessions, which is founded on stat. 9 Geo. 4, c. 61, is illegal, and when it is brought up by *certiorari* for the purpose of being enforced, the rights of the party bringing it up are to be enforced according to law; and we have no right to issue a *fi. fa.* upon an illegal order. Our proceedings, therefore, for enforcing this order ought to be set aside, and the money levied under it, and the 10*l.* which was wrongfully paid, must be returned.

Rule absolute accordingly; each party to pay his own costs.

REGINA v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.¹

Trinity Term, June 2, 1851.

REGINA v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.¹

Trinity Term, June 13, 1851.

Railway Company—Duty to complete Road—Mandamus.

A railway act, which received the royal assent on the 18th of June, 1846, enacted that the powers of the company for the compulsory purchase of lands for the purposes of the act should not be exercised after the expiration of three years, extended by a subsequent act to five years, and that the railways authorized by the act should be completed within five years, and on the expiration of such period the powers granted to the company for executing the same should cease to be exercised, except as to so much of such railways as should then be completed.

Regina v. The York, Newcastle, and Berwick Railway Company.

Shortly after the passing of the act a portion of one of the branch lines had been set out, and the remainder in October, 1848; but no notice had been given to any land owner that his land would be required. At a meeting of the shareholders, it had been resolved that the directors should not commence the making of any branch line without the consent of a general meeting of the company. An application to the company to make the branch line in question was made in March last, and a rule for *mandamus* to the company to make and complete it was obtained in Easter term:—

Held, that the land owners had not been guilty of laches in making the application, and that the company had not shown a want of power to obey the writ; and, therefore, the court made the rule absolute.

So ruled also where, at a general meeting of the shareholders of the company, it had been resolved that the making of the branch line should be abandoned, and it was not shown by the affidavits on which the rule was obtained that the company had funds for completing the line.

REGINA V. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

IN Easter term (April 30) a rule was obtained calling upon the York, Newcastle, and Berwick Railway Company to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to make and complete a railway from Thirsk to Malton. It appeared from the affidavits, upon which the rule was obtained, that the act "for enabling the Newcastle and Darlington Junction Railway Company to make a railway from or near Thirsk to Malton, with a branch to Hemsley," (9 & 10 Vict. c. 58,) received the royal assent on the 18th of June, 1846. By sect. 14, the powers of the company for the compulsory purchase of lands for the purposes of the act shall not be exercised after the expiration of three years from the passing of the act. That period was, by a subsequent act, extended to two years more. By sect. 15, the railways authorized by the act shall be completed within five years from the passing of the act, and on the expiration of that period the powers by that act, or the acts incorporated therewith or extended thereto, granted to the company for executing the same railways, or otherwise in relation thereto, shall cease to be exercised, except as to so much of such railways as shall then have been completed, and except such powers as are by the same acts, or any of them, declared to be continued for a longer period. By stat. 10 & 11 Vict. c. 133, A. D. 1847, the Newcastle and Darlington Junction Railway, then called the York and Newcastle Railway Company, and the Newcastle and Berwick Railway Company, were consolidated into one undertaking; and by sect. 27, the name of the consolidated companies was to be "The York, Newcastle, and Berwick Railway Company." Stat. 10 & 11 Vict. c. 134, recited that it would be attended with local and public advantage if certain lines of railway from, or connected with, the lines of railway belonging to, or leased by, the York and Newcastle Railway Company were authorized to be made, and a portion of the authorized line of the Thirsk and Malton Railway was abandoned; and certain lines of railway to be made under the authority of the act were specified in sect. 11; a power to abandon part of the Thirsk and Malton Branch, authorized by stat. 9 & 10 Vict. c. 58, was given in sect. 22. By stat. 11 & 12 Vict. c. 55, the York, Newcastle, and Berwick

Regina v. The York, Newcastle, and Berwick Railway Company.

Railway Company were enabled to deviate or alter part of the Thirsk and Malton Branch Railway, and to abandon parts of the same. Before the year 1846, other parties had intended to make the railway, but they abandoned that intention. Shortly after the passing of the act obtained by the defendants in 1846, a portion of the line had been set out by the engineer of the company, by driving stakes into the ground, and the remainder in October, 1848, and several excavations had been made to ascertain the nature of the soil, but no further step had been taken. Early in this year there had been a meeting of land owners, at which it was resolved that application should be made for a *mandamus* to compel the company to complete the railway. The land owners were, for the most part, willing to treat for the sale of the lands which would be required for the railway, and some of them were ready to sell at moderate prices. Shares had been in part issued, and the company had funds. The applicants were injured by the railway not being completed.

The affidavits in opposition to the rule stated that no notice had been given to any land owner that his land would be required, and no steps taken towards the purchase of the lands; that a committee had been appointed to investigate the affairs of the company, and that the result was, that they were in a confused and unsatisfactory state; and that at a meeting of the shareholders it had been resolved that the directors should not commence the making of any new branch line without the consent of a general meeting of the company; and that the line in question, when completed, would be very unremunerating. The length of the railway required to be made was twenty-eight miles, and there were about one hundred owners of the land, and between two and three hundred occupiers, some of the owners being ecclesiastical and eleemosynary corporations, and committees of lunatics. The parties, on whose behalf this rule was obtained, commenced a correspondence with the company in January last, to complete the line, which ended in March in a formal application to the defendants to complete the line, and this rule was drawn up for the 30th of May.

Sir F. Kelly, Knowles, and Atherton now showed cause. The parties applying for this *mandamus* have taken no step from the 18th of June, 1846, when the act for making the branch railway in question was passed, until January, 1851, a period of four years and a half, though they knew that the company had not purchased, or attempted to purchase, a single acre of land for the purpose of the railway. The power for the compulsory purchase of land, as to part of the line, expires on the 13th of July next; and as to the remaining portion, on the 22d of July. The necessary steps for purchasing the lands cannot be taken on or before either of those days.

[*Lord Campbell, C. J.* Why may not notice be given to all the land owners whose lands are required for the railway?]

By sect. 20 of stat. 8 & 9 Vict. c. 18, the defendants must give twenty-one days' notice to the land owner that they require to purchase his land, before they can proceed to get the amount of

Regina v. The York, Newcastle, and Berwick Railway Company.

compensation settled; and by sect. 18, the notice must state the particulars of the land so required.

[*Lord Campbell, C. J.* If it is obligatory on the defendants to make the railway, it must be assumed that they have all the notices ready to be given, according to the provisions of the act.

Coleridge, J. By sect. 85, the defendants may enter upon the land, before any agreement is come to, on depositing in the Bank of England either the amount of purchase money or compensation claimed by the land owner, or, if the land owner did not make any claim, such a sum as shall, by a surveyor appointed by two justices, be determined to be the value of the land.]

But, in the latter case, before the sum could be determined, the powers for the compulsory purchase of land would have expired; and sect. 85 was introduced for the relief of railway companies. Stat. 8 & 9 Vict. c. 18, confers upon the land owner, not upon the company, the election of three modes for settling the amount of compensation when no agreement can be come to. [They referred to sects. 23, 24, 38, and 41.]

[*Coleridge, J.* In *Doe d. Armistead v. The North Staffordshire Railway Company*, 15 Jur. 943; s. c. 4 Eng. Rep. 216, it was held, that the ascertaining the amount of compensation after lands had been entered upon and taken, under sect. 85, was not an exercise of a compulsory power by the company.]

The reasonable rule is, that parties interested in the completion of the railway are not to apply to the court while the company is proceeding with ordinary and reasonable diligence; but if the company have failed to take any steps towards making the railway, the parties should apply so early that the court may have no reasonable doubt that there will be sufficient time for taking the necessary steps.

[*Lord Campbell, C. J.* The company obtained an act to allow them to abandon some of the deviations, and to extend the time for making the others; it must, therefore, be assumed that it is obligatory on them to make the others; and upon that supposition, it lies upon the defendants to show that it is impossible to take the necessary steps within the time given by their act.]

This is not an application to complete a railway already commenced, but to make a railway not commenced. Under these circumstances the court will not, in the exercise of its discretion, direct this *mandamus* to issue. In *Reg. v. The London and North-western Railway Company*, 15 Jur. 873; s. c. *ante*, p. 220, where the question arose upon the return to the writ, the court refused to issue a peremptory *mandamus*. The court must look at the state of things at the time when the *mandamus* is to issue. A return could not be made to this writ in the present term.

Sir F. Thesiger and *T. P. E. Thompson*, contra. If the land owners apply soon after the company have obtained their act, the answer to the application is, that the company have a discretion as to the time of proceeding with the works within the time limited by their act. In this case, the time for the exercise of the compulsory powers of

Regina v. The York, Newcastle, and Berwick Railway Company.

purchasing lands has not expired, and the defendants have more than two years for constructing the railway. The lands were, to a certain extent, taken possession of by the defendants when the line of the railway was set out. By sect. 20 of stat. 8 & 9 Vict. c. 24, any person removing any poles or stakes driven into the ground for the purpose of setting out the line of the railway, or defacing or destroying any marks made for the same purpose, is subject to a penalty. Before a company applies to Parliament for a bill enabling them to make their railway, they are obliged to ascertain whether every land owner along the proposed line agrees or disagrees, or remains neutral; and, therefore, the requisite notices may be given to the owners and occupiers of lands immediately. A notice from the company to the land owner, that his land will be required, binds both parties from the time at which it is given; *Stone v. The Commercial Railway Company*, 4 My. & C. 522; *Worsley v. The South Devon Railway Company*, 15 Jur. 970; s. c. 4 Eng. Rep. 273; and the company can compel the land owners to complete the contract after the time for the exercise of the compulsory powers has expired. By sect. 84 of stat. 8 & 9 Vict. c. 18, the company shall not enter upon any land until they shall have paid the purchase money, or deposited it in the bank. But if they proceed under sect. 85, by entering upon or taking the land before an agreement is come to, no notice is necessary, provided the land is scheduled and lies within the limits of deviation allowed by the special act. *Doe d. Armistead v. The North Staffordshire Railway Company*, 15 Jur. 943; s. c. 4 Eng. Rep. 216. At any rate, the company may enter before the expiration of the twenty-one days required by sect. 21. In *Reg. v. The London and North-western Railway Company*, 15 Jur. 873; s. c. ante, p. 220, an impossibility to obey the writ was shown, because the power for the compulsory purchase of lands had expired in July, 1849, and the application for a *mandamus* was made in April, 1850. The resolution of the shareholders, that the directors should not commence any new branch line without the consent of a general meeting of the company, is not equivalent to a resolution that the line should be abandoned.

LORD CAMPBELL, C. J. I am of opinion that this rule should be made absolute. For the present, we must assume that the company have entered into a contract to make the line in question, and that it is obligatory upon them, for they are not in the situation of a company who have not exercised any of the powers conferred upon them by the legislature. The land owners, also, have a vital interest in seeing that the contract is performed; therefore, this court will, upon their application, compel the company by *mandamus* to perform that legal obligation, there being no other legal remedy. But if the land owners do not apply until the powers of the company for the compulsory purchase of lands have expired, they are guilty of laches, and call upon the court to compel the company to do that which is illegal; and our decision in *Reg. v. The London and North-western Railway Company*, 15 Jur. 873; s. c. ante, p. 220, proceeded upon that principle. In *Reg. v. The Birmingham and Gloucester Railway Company*, 2

Regina v. The York, Newcastle, and Berwick Railway Company.

Q. B. 47, 61; 6 Jur. 146, 147, it was laid down, that a return by the company that they could not obey the writ, because that which they were commanded to do had become impossible by reason of their compulsory powers of purchasing under the special act having expired before they were called upon to do it, was inadmissible; but, with the most profound respect for my predecessor in this seat, I think that case goes too far. Still it lies upon those who contest their liability to the writ to show the impossibility of fulfilling their obligation; and that is not shown by the defendants in this case. If due diligence were used, the line might be completed within the time fixed by the legislature; the defendants do not aver a want of funds, or a disagreement with the land owners as to the terms of purchasing the lands. As to the argument, that the time for the exercise of the compulsory powers will expire before a peremptory *mandamus* could issue after a return had been made to the writ, we cannot listen to it. If, instead of obeying the writ, the defendants make a bad return to it, they will do so at their peril. If it has become impossible to fulfil the contract at the time of the issuing of the peremptory *mandamus*, it will be open to the defendants to contest their liability on that ground in a court of error. But we shall make this rule absolute, assuming that the company are bound to obey the writ.

PATTESON, J. If we saw clearly that the powers of the company for the compulsory purchase of lands could not be exercised, this case would come within the authority of *Reg. v. The London and North-western Railway Company*, 15 Jur. 873; s. c. *ante*, p. 220, but I am not satisfied that such is the state of the case. All the initiatory steps may be taken by the company, and the other steps, under sect. 84, if necessary. Therefore, it is not shown that the company are disabled altogether from proceeding to complete the line, nor that, by making this rule absolute, we bring ourselves within the predicament of issuing a writ commanding the defendants to do that which is impossible.

COLERIDGE, J. The only question now is, whether the company have sufficient time for doing an act which we must assume, for the purposes of this rule, they ought to have done. I do not think that they have made out the impossibility of doing it at the present time. It may turn out that this court has no power to compel them to complete the line, and then they will not be prejudiced by our making this rule absolute. But if, on the other hand, the defendants should make a return to the writ, and the court should ultimately think that they were bound to complete the line, they will receive no benefit from the delay occasioned by making a return, because they will have been proved to be in the wrong. In considering whether the company will have reasonable time for purchasing the lands necessary for making their line, time must be taken strictly against them, because, on the passing of their act, they ought to have taken steps *bona fide* for the purchase of the lands. On the other hand, in considering whether the land owners have been guilty of negligence

Regina v. The Lancashire and Yorkshire Railway Company.

in making this application, time ought to be taken favorably as regards them, because they are under a difficulty in knowing at what period they ought to apply for a *mandamus* against the company; and I am of opinion that they have not been guilty of any negligence. The whole period down to 1849 is accounted for, and we ought to reckon from that time in estimating whether they have been guilty of negligence in making this application.

ERLE, J. It has been admitted throughout the argument, that the obtaining a private act, enabling parties to execute a work such as this, creates an obligation upon the parties to complete it. Therefore, the only question now is, whether the applicants in this case have come to this court within a reasonable time. And the question is reduced to this point, whether there is sufficient time for the performance by the defendants of an assumed legal duty. I think there is. As to the wide proposition, that the special act imposes upon the company an obligation to make this line, which may be enforced by *mandamus*, that is open to further consideration.

Rule absolute.

REGINA v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Trinity Term, June 13, 1851.

RULE calling upon the defendants to show cause why a *mandamus* should not issue, directed to them, commanding them to make and complete a branch railway from Salter Hebble to Huddersfield. It appeared from the affidavits that the company were incorporated by stat. 9 & 10 Vict. A. D. 1846, and were entitled to raise altogether 2,000,000*l.*, and no more. They had borrowed 354,000*l.* on the security of bonds under their seal, and, if the calls had been paid up, 1,524,000*l.* would have been raised. They had expended all the money raised, and were under liabilities to the amount of 100,000*l.*, and were unable to raise more money. The communication between the two towns was sufficient, and if the railway was open for public use, it would not pay the working expenses. The powers of the company for the compulsory purchase of lands were in the first instance given for three years, and were subsequently extended for a period which would expire on the 18th of August, 1851. The application to the company to proceed in making and completing the railway was made in April last. The affidavit of the engineer of the company stated that two months would elapse before the requisite notices could be given, and that four years would be required to complete and construct the railway. At a general meeting of the shareholders it had been resolved, that the making of this branch should be abandoned. This resolution was published in the local newspapers, and was notorious to all persons interested in the progress and construction of the works of the railway.

Regina v. The Lancashire and Yorkshire Railway Company.

Sir F. Kelly, Peacock, Wilkins, Serj., and Tomlinson showed cause. There is sufficient means of communication between the two towns without the branch which the defendants are called upon to make.

[*Lord Campbell, C. J.* That is a subject for the consideration of the legislature.]

The court will not compel the defendants to purchase engines and to run trains when that would be done at a loss to the company.

[*Lord Campbell, C. J.* None of the railway acts compel the companies to run trains.

Erle, J. There is a clause in the special act enabling the defendants to act as carriers; that is compulsory, as in the case of a clause enabling the company to lay down rails.

Lord Campbell, C. J. We will not issue a *mandamus* commanding the defendants to commit a trespass.]

Nor will the court grant a *mandamus* commanding the defendants to do that which is impracticable at the time. There was laches and unnecessary and unreasonable delay in deferring the application to the company to make the railway until April last, since the powers for the compulsory purchase of lands, which have continued for five years, will cease in August next.

[*Lord Campbell, C. J.* It cannot be said that there has been laches during the whole of the five years.]

Sect. 84 of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, contemplates the necessity of a survey before the works are commenced; it contains a proviso, that for the purpose merely of surveying and taking levels, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the company to enter upon the land without previous consent. The deposit of the purchase money gives no title to the land.

[*Lord Campbell, C. J.* According to the decision of this court, it gives a title which cannot be disturbed.]

But that is a title to the possession only. The resolution passed at a meeting of the shareholders is a bar to this application by shareholders who may not have paid up their shares.

Sir F. Thesiger, (with him were *Knowles* and *J. Addison*.) contra. The resolution of the shareholders to abandon the line was illegal, and would be no bar even to an application by shareholders. In *Reg. v. The Eastern Counties Railway Company*, 10 Ad. & El. 531, the application for a *mandamus* to complete the railway was made upon the affidavits of shareholders. (See 10 Ad. & El. 536, 539, 549.) But one of the parties who makes this application is a land owner; and the land owners would not be affected by the resolution of the shareholders; and if they could be affected by it, they had no notice of it; the advertising it did not operate as notice to them. [He was then stopped.]

LORD CAMPBELL, C. J. There is no distinction between this case

Regina v. The Justices of Middlesex.

and *Reg. v. The York, Newcastle, and Berwick Railway Company*, which we disposed of in this term.

PATTESON, COLERIDGE, and ERLE, JJ., concurred.

On a subsequent day, (June 16,) —

Rule absolute.

Peacock and *Tomlinson* showed cause against another rule for a similar *mandamus* against the same defendants, on the ground that it was not shown by the affidavits upon which the rule was obtained that the defendants had funds for completing the railway.

Sir F. Thesiger and *Hugh Hill*, contra, were not called upon.

LORD CAMPBELL, C. J. We shall presume that the company have funds.

PATTESON, COLERIDGE, and ERLE, JJ., concurred.

Rule absolute.

REGINA v. THE JUSTICES OF MIDDLESEX.¹

Bail Court, Easter Term, May 6, 1851.

Costs of Mandamus to Sessions.

The right to the costs of a *mandamus* to sessions to hear an appeal does not depend upon whether or not cause has been vexatiously shown against the rule for the writ, but whether cause has been unsuccessfully shown.

At the sessions, an objection was raised by the bench to the right of the appellants to be heard, and they accordingly refused to hear the appeal. Upon a motion for a *mandamus* to compel them to hear it, the respondents showed cause; but the rule was made absolute, and the appellants succeeded at the sessions:—

Held, upon an application by the appellants for the costs of the application for the *mandamus*, that they were entitled to have them from the respondents.

THIS was a rule calling on the church-wardens and overseers of the parish of St. James, Clerkenwell, to show cause why they should not pay to the church-wardens and overseers of the parish of St. Luke, or their attorney, their costs of obtaining a writ of *mandamus* in this prosecution, the costs of and incident to the said writ, and also the costs of the present application. It appeared that an order for the removal of a pauper from St. James's to St. Luke's had been made on the 10th of July, 1846; that notice of appeal was given on the 10th of August, but afterwards countermanded, and the pauper was removed on the 28th of September; notice and grounds of appeal were served on the 23d of November; the appeal came on for hearing

¹ 15 Jur. 907.

Regina v. The Justices of Middlesex.

on the 11th of December. It appeared to the magistrates that there was not any grievance for which an appeal would lie, and they, therefore, refused to hear it; they also refused to grant the appellants a case. A *mandamus* had been obtained from this court, commanding the justices to enter continuances and hear the appeal; it was respited from sessions to sessions, until the 27th of January, 1850, when the order of removal was quashed, subject to a case. No *certiorari*, however, had issued to bring up the case, but the pauper was taken back on the 30th of January, and the respondents had paid the costs of his removal and maintenance.

Hall showed cause. The general rule is, that a party is not to pay the costs of supporting a judgment made in his own favor. The objection here had been taken by the magistrates themselves; and that distinguished the case from *Reg. v. The Justices of Surrey*, 14 Jur. 457. The question there was a mere point of practice, whereas here an important point of law was involved; and as judgment below had been given for the respondents, they acted correctly in opposing the *mandamus*.

[*Coleridge, J.* Do you maintain that, because you were right in showing cause, you ought not to pay costs?]

He submitted that the special circumstances of the case formed an exception to the general rule. Another point was, that the applicants were too late in their application. The case was at an end immediately the continuances were entered, and they could not now come upon the church-wardens and overseers of 1850 to pay the costs of the church-wardens and overseers of 1847 and 1848. [He referred to stat. 11 & 12 Vict. c. 91.]

Pashley, in support of the rule, was not called upon.

COLERIDGE, J. I cannot think this application too late. Till the appeal was decided, the question of costs could not be said to arise. Now, on the general point, I must say the course of the decisions is uniform. The decision of the Quarter Sessions we must now take to be wrong; the application was to reverse that decision, and the other side were not bound to oppose that application; they might, or they might not, do so. If they do, although it cannot be said they do any thing wrong or vexatious, yet they act at their own peril, and are not to throw the costs of their opposition on the other side. The unsuccessful party must pay the costs. Surely it is not to be laid down as a rule, that costs are only to be given where there is misconduct or fraud on the part of the unsuccessful party.

Rule absolute.

Regina v. The Dean and Chapter of Rochester.

REGINA v. THE DEAN AND CHAPTER OF ROCHESTER.¹

Easter Term, April 26 and 30, 1851.

Mandamus — Grammar School — Removal of Master — Visitor — Disqualification — Excess of Jurisdiction.

Mandamus to the dean and chapter of R. to restore the prosecutor to the office of head master of the grammar school of the cathedral. Return, (after setting out the statutes of the founder of the cathedral church, by which the head master of the grammar school was to be elected by the dean and chapter, and the bishop was appointed visitor of the cathedral church,) that the prosecutor, having been removed from his office, had not appealed to the bishop. Plea, that the writing and publishing of a certain pamphlet was the cause of removal of the prosecutor from his office: that the bishop of R. was formerly the dean of W., and that the matters contained in the pamphlet, which relate to the improper application of the funds of the cathedral church of W., were written and published of and concerning the bishop of R. as former dean of W.; that the prosecutor wrote and published the pamphlet with the intention of attributing to the dean and chapter of W., while the said bishop of R. was dean of W., the same identical neglect and improper conduct with respect to the cathedral church of W., and in and about the application of the funds and endowments relating thereto, as are charged against the dean and chapter of R. with respect to the cathedral church of R., and in and about the misapplication of the funds and endowments relating thereto; that passages in the pamphlet were written and published with the intention of imputing to the bishop of R., as visitor of the cathedral church of R., a knowledge of the misapplication of the funds, in violation of the statutes of the said cathedral church, by the dean and chapter; and that the dean and chapter had declared, under their common seal, that they removed the prosecutor from his office in consequence of his having written and published, in the said pamphlet, passages untruly alleged to be libellous, and directed as well against the dean and canons of the cathedral church of R. as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches; that by reason of the premises, the bishop had such an interest in the cause of removal of the prosecutor as to disqualify him from acting as visitor.

By the 35th statute, "De Corrigendis Excessibus," si quis minorum canonicorum, clericorum, aut aliorum ministrorum in levi culpa delinquerit arbitrio decani aut eo absente vice decani corrigatur; sin gravius fuerit delictum (si iustum iudicabitur) ab iisdem expellatur a quibus fuit admissus. The 38th statute, "De Visitatione Ecclesiarum," by which the bishop was appointed visitor, contained the following clause: "Omniaque faciat quæ ad visitatoris officium de jure pertinere denoscuntur."

Upon demurrer to the return:—

Held, first, that the 35th statute did not give the dean and chapter authority to act as visitor of the grammar school.

Secondly, that, the bishop being constituted visitor of the grammar school by the 38th statute, the cause of removal of the prosecutor from his office was not an excess of jurisdiction by the dean and chapter which could be made the ground of a *mandamus*.

Thirdly, that the bishop had not such a personal interest in the cause of removal of the prosecutor as disqualified him from acting as visitor.

MANDAMUS to the Dean and Chapter of the Cathedral Church of Rochester recited that Robert Whiston, clerk, had been duly elected and admitted to, and into the place and office, of head master of the grammar school of, or annexed to, the said cathedral church, founded by letters patent of King Henry VIII. and that the defendants, without any reasonable cause, unjustly removed him, and commanded them to restore him to the said place and office. Return, that King Henry VIII. was seized in his demesne as of fee, in right of his crown,

¹ 15 Jur. 920.

Regina v. The Dean and Chapter of Rochester.

of certain lands in Rochester, the same lands having been the site of a certain convent or monastery, to wit, &c., and being so seized, on the 18th of June, in the thirty-third year of his reign, by his letters patent, founded the Cathedral Church of Rochester. The letters patent were set out; they contained the grant of a common seal to the dean and chapter, by which they might bind themselves and their successors, and contained the following clause: "Volumus etiam et per præsentis concedimus præfato decano et capitulo dictæ ecclesiæ cathedralis Christi et Beatæ Mariæ Virginis, Roffensis, et successoribus suis, quod decanus ecclesiæ cathedralis illius pro tempore existens omnes et singulos ecclesiæ ejusdem cathedralis inferiores officarios et ministros ac alias prædictæ ecclesiæ cathedralis Christi et Beatæ Mariæ Virginis, Roffensis, quascumque personas, prout casus sive causa exiget, faciet, constituet et admittet et acceptabit de tempore in tempus in perpetuum, et eos ac eorum quemlibet sic admissos vel admissum ob causam legitimam non solum corrigere, deponere, sed etiam ab eadem ecclesia cathedrali amovere et expellere possit et valeat." That on the 30th of June, in the thirty-sixth year of his reign, King Henry VIII., by indenture, made in pursuance of the provision in that behalf in the said letters patent, declared divers ordinances, rules, and statutes of and concerning the premises in the said letters patent mentioned, to the tenor and effect following. The statutes were set out, among which the most material are the following:—

"3. Juramentum Decani.

"Ego N. qui in decanum hujus ecclesiæ cathedralis electus et institutus sum Deum testor, et per hæc sancta Dei evangelia juro, quod pro virili mea in hac ecclesia bene et fideliter regam et gubernabo juxta ordinationes et statuta ejusdem. Et quod omnia illius bona, terras, tenementa, redditus et possessiones, juraque et libertates, atque privilegia, cæterasque res universas, tam mobiles (salvo eorum rationabili usu) quam immobiles, et alia omnia commoda ejusdem ecclesiæ bene et utiliter custodiam ac servabo, atque ab aliis similiter fieri curabo: ad hæc omnia et singula statuta et ordinationes Regis Henrici Octavi fundatoris nostri quatenus me concernunt bene et fideliter observabo, et ab aliis quatenus eos concernunt studiose observari procurabo. Sicut me Deus adjuvet et hæc sancta Dei evangelia.

"Volumus autem ut tam decanus ipse quam canonici et cæteri ecclesiæ nostræ ministri in admissione sua in regiæ majestatis successionem et supremitatem juxta formam statutorum regni hujus in hoc ipsum editorum jurent."

"4. De Officio Decani.

"Quoniam decanum vigilantem esse decet veluti oculum in corpore, qui reliquis corporis membris haud negligenter prospiciat, statuimus et volumus, ut decanus qui pro tempore fuerit cum omni sollicitudine præsit, canonicos cæterosque ministros ecclesiæ omnes moneat, increpet, arguat, obsecret, opportune importune instet, tanquam excubias agens in reliquum gregem suæ curæ commissum: curet autem ut divina officia cum decore celebrentur, ut conciones præscriptis

Regina v. The Dean and Chapter of Rochester.

diebus habeantur, ut pueri cum fructu instituantur, ut eleemosynæ pauperibus distribuantur, ut in universum concredita sibi munera singuli fideliter obeant: præterea decani interesse debet ut cum præsens fuerit honestam et competentem familiam alat, pauperibus panem frangat, qua in re ipsius conscientiam oneramus ut honeste et frugaliter in omnibus se exhibeat. Decanum autem insigniter miserum castigabit episcopus. Canonicos vero insigniter miseros castigabit decanus, qui etiam malos et in officio tardos per statuta corriget atque puniet."

"9. De Obedientia Decano præstanda.

"Quum doceat divus Paulus præpositis obediendum esse, volumus et mandamus, ut tam canonici quam minores canonici et cæteri ecclesiæ nostræ ministri omnes et singuli ipsum decanum, caput suum et ducem agnoscant ipsumque revereantur, et in omnibus rebus mandatis licitis et honestis, quæ statuta nostra concernunt, aut ad bonum regimen et statum ecclesiæ nostræ pertinent, ipsi decano aut ipsius vicem obeunti aut illis absentibus seniori secundum admissionem canonico pareant, obediant, adsistant et auxilientur."

"21. Juramentum Ministrorum.

"Ego N. ecclesiæ cathedralis Christi et Beatæ Mariæ, Roffensis, in N. electus juro, quod quamdiu in hac ecclesia morabor omnes ordinationes et statuta a potentissimo Rege Henrico Octavo hujus ecclesiæ fundatore edita quatenus me concernunt pro mea virili inviolabiliter observabo: ad hæc decano et canonicis debitam obedientiam ac reverentiam exhibebo. Denique commodum et honorem hujus ecclesiæ diligenter procurabo. Sicut me Deus adjuvet et hæc sancta Dei evangelia.

"Quod quidem juramentum in admissione sua præstare volumus singulos ecclesiæ nostræ ministros."

"26. De Pueris Grammaticis, et eorum Informatoribus.

"Ut pietas et bonæ literæ perpetuo in ecclesia nostra suppullascant, crescant, floreat, et suo tempore in gloriam Dei et reipublicæ commodum et ornamentum fructificent, statuimus et ordinamus, ut ad electionem et designationem decani, aut eo absente vice decani, et capituli sint perpetuo in ecclesia nostra Roffensi viginti pueri pauperes et amicorum ope destituti de bonis ecclesiæ nostræ alendi, ingeniis (quoad fieri potest) ad discendum natis et aptis. Quos tamen admitti nolumus in pauperes pueros ecclesiæ nostræ antequam noverint legere, scribere, et mediocriter calluerint prima grammaticæ rudimenta, idque judicio decani et archididasculi, atque hos pueros volumus impensis ecclesiæ nostræ ali donec mediocrem Latinæ grammaticæ notitiam adepti fuerint, cui rei dabitur quatuor annorum spatium, aut si ita decano et archididasculo visum sit ad summam quinque et non amplius. Volumus autem ut nullus nisi ecclesiæ nostræ Roffensis chorista fuerit in pauperem discipulum ecclesiæ

Regina v. The Dean and Chapter of Rochester.

nostræ eligatur, qui nonum ætatis suæ annum non compleverit vel qui quintum decimum ætatis suæ annum excesserit. Quod si quis puerorum insigni tarditate et hebetudine notabilis sit aut natura ab literis abhorrenti, hunc post multam probationem volumus per decanum expelli et alio amandari, ne veluti fucus apum mella devoret. Atque hic conscientiam informatorum oneramus, ut quantam maximam potuerint operam ac diligentiam adhibeant, quod pueri omnes in literis progrediantur et proficiant, et nequem puerum tarditatis vitio insigniter notatum inter cæteros diutius inutiliter hæreere sinant, quin illius nomen statim decano deferant, ut eo amoto ad illius locum aptior per decanum aut eo absente vice decanum et capitulum eligatur. Statuimus præterea ut per decanum vel eo absente vice decanum et capitulum unus eligatur Latine et Græce doctus, bonæ famæ et piæ vitæ, docendi facultate imbutus, qui tam viginti illos ecclesiæ nostræ pueros quam alios quoscunque grammaticam discendi gratia ad scholam nostram confluentes pietate excolat et bonis literis exornet: hic in schola nostra primas obtineat et archididasculus sive præcipuus informator esto. Rursum per decanum aut eo absente vice decanum et capitulum volumus virum alterum eligi bonæ famæ et piæ vitæ, Latine doctum docendique facultate imbutum, qui sub archi didasculo pueros docebit prima scilicet grammaticæ rudimenta et proinde hypo didasculus sive secundarius informator appellabitur. Hos vero informatores puerorum volumus, ut regulis et docendi ordine quem decanus et capitulum præscribendum duxerint diligenter ac fideliter obsecundent, quod si desidiosi aut negligentes aut minus ad docendum apti inveniantur post trinam monitionem a decano et capitulo admoneantur et ab officio deponantur. Omnia autem ad functionem suam spectantia se fideliter præstaturos juramento promittent."

"35. De Corrigendis Excessibus.

"Ut in ecclesia nostra morum integritas servetur statuimus et volumus, ut si quis minorum canonicorum, clericorum, aut aliorum minorum in levi culpa delinquerit arbitrio decani aut eo absente vice decani corrigatur; sin gravius fuerit delictum (si justum judicabitur) ab iisdem expellatur a quibus fuit admissus. Si quis autem canonicorum in offensa aliqua aut crimine unde ecclesiæ nostræ grave scandalum oriri possit culpabilis inventus fuerit, is per decanum aut eo absente vice decanum admoneatur: quod si tertio admonitus se non emendaverit apud episcopum visitatorem suum accusetur et illius judicio corrigatur. Pauperum vero quoties delinquerint correctionem decani aut eo absente vice decani judicio reservamus, qui si incorrigibiles permanserint per decanum cum capituli consensu a nostra ecclesia expellantur et omne in ea emolumentum perdant."

"38. De Visitatione Ecclesiæ.

"Nullum opus est adeo pie cæptum, adeo prospere productum, adeo fideliter consummatum, quod non facile subruatur ac incuria et negligentia subvertatur; nulla tam sancta et firma statuta conduntur

quin temporis diuturnitate in oblivionem et contemptum veniant, si non adsit continua vigilantia et pietatis zelus: quod quidem ne in ecclesia nostra unquam fiat aut evenire possit nos episcopi Roffensis, qui pro tempore fuerit, fide ac diligentia freti eundem ecclesiæ nostræ cathedralis Roffensis visitatorem constituimus, volentes ac mandantes ut pro Christiana fide, et ardenti pietatis zelo vigilet, et graviter curet ut hæc statuta et ordinationes ecclesiæ nostræ a nobis editæ inviolabiliter observentur, possessiones et bona tam spiritualia quam temporalia prospero statu floreant, jura, libertates et privilegia conserventur et defendantur: atque, ut hæc ita fiant, statuimus et volumus, ut episcopus ipse quoties a decano vel a duobus canonicis rogatus fuerit, immo licet non rogatus semel tamen quovis triennio ad ecclesiam nostram in persona propria (nisi grandis obstiterit necessitas) alioquin per cancellarium suum accedat, decanum, canonicos, minores canonicos, clericos, cæterosque omnes ecclesiæ nostræ ministros in locum congruum convocet. Cui quidem episcopo præsentis statuti vigore plenam concedimus potestatem et auctoritatem, ut super singulis articulis in statutis nostris contentis et quibuscunque aliis articulis statum, commodum aut honorem ecclesiæ nostræ concernentibus, decanum, canonicos, minores canonicos, cæterosque ministros cogat, et eorum quemlibet per juramentum ecclesiæ præstitum veritatem dicere de omnibus delictis et criminibus quibuscunque. Comperta autem et probata juxta delicti et criminis mensuram puniat episcopus atque reformet, omniaque faciat quæ ad vitiorum rescacationem necessaria videbuntur, quæque ad visitatoris officium de jure pertinere denoscuntur. Quos quidem omnes tam decanum quam canonicos et alios ecclesiæ nostræ ministros quoad omnia præmissa volumus et mandamus ipsi episcopo parere et obedire. Statuimus autem in virtute juramenti ecclesiæ nostræ præstiti, ut nemo contra decanum aut canonicos aut aliquem ministrorum ecclesiæ nostræ quicquam dicat et enunciet nisi quod verum crediderit aut de quo publica vox vel fama circumlata fuerit. Volumus præterea ut decanus communibus ecclesiæ nostræ sumptibus episcopo visitanti octoque personis comitato unam aut ad summam duas refectiones intra ecclesiæ nostræ ædes preparet et apponat. Porro quia hæc nostra statuta perpetuo durare optamus, volumus ut si qua ambiguitas, contentio aut dissensio orta fuerit posthac inter decanum et canonicos aut inter canonicos ipsos de vero et sincero intellectu statutorum nostrorum, quæ omnia juxta planum et grammaticum sensum intelligi volumus, decernimus ut statutum illud vel aliqua statuti clausula de qua orta est contentio ad Archiepiscopum Cantuariensem referatur, cujus interpretationi et declarationi, modo statutis nostris non repugnet, eos qui dubitarunt aut contenderunt sine delatione aut contradictione stare et obedire præcipimus. Inhibemus tamen visitatori et statutorum declaratori aliisque omnibus cujuscunque dignitatis aut auctoritatis fuerint ne ulla nova statuta condant aut cum aliquo dispensent: inhibemus etiam decano et canonicis ecclesiæ nostræ ne hujusmodi statuta recipiant sub pœna perjurii et amotionis perpetuæ ab ecclesia nostra. Reservamus tamen nobis et successoribus nostris plenam potestatem et auctoritatem statuta hæc mutandi, alterandi, et si videbitur etiam nova condendi."

Regina v. The Dean and Chapter of Rochester.

That the said cathedral church is a cathedral church within the meaning of an act of Parliament passed in the sixth year of Queen Anne, intituled "An Act for the avoiding of Doubts and Questions touching the Statutes of divers Cathedrals and Collegiate Churches;" that the Bishop of Rochester for the time being has, under and by virtue of the same statute, rules, and ordinances, and the same letters patent, been the visitor of the said cathedral church; and that the said Robert Whiston was elected head master under, and by virtue of, and in conformity with the said statutes, rules, and ordinances; and the said Robert Whiston having been removed from the said cathedral church, and from his said office or employment of head master as aforesaid, to wit, for lawful cause in that behalf, he, the said Robert Whiston, has not appealed to the Bishop of Rochester for the time being, as it was lawful for him to do if he had so thought fit; and that before, and at the time of, the said removal and of issuing the said writ, the Right Rev. George Murray, by divine permission Lord Bishop of Rochester, was, and thence hitherto has continued to be, and is the Bishop of Rochester. First plea, that the cause for which the prosecutor was removed from the said cathedral church, and from his said office or employment of head master, was not a lawful cause in that behalf, in manner and form, &c. Second plea, as to so much of the said return as relates to the prosecutor not having appealed to the said Bishop of Rochester, as in the said return it is alleged that it was lawful for the prosecutor to do, the prosecutor repeats the averments in the next succeeding plea, as to the cause of his removal, and says, that the matters and things in the said pamphlet averred and intended to be implied and understood were true; and that the writing, printing, and publishing of the pamphlet in the next succeeding plea mentioned is the said cause of removal in the return alleged as the cause of removal of the prosecutor from his said office of head master, as in the said return mentioned, and not any other or different cause whatsoever; and that there never was any cause for his said removal other than the writing, and causing to be printed and published, the said pamphlet by the prosecutor, as in the same plea mentioned; and that the Bishop of Rochester in the said pamphlet mentioned is the same Bishop of Rochester to whom it is alleged in the return that it was lawful for the prosecutor to have appealed, and the same Bishop of Rochester was formerly the Dean of Worcester in the said pamphlet mentioned, and is the person mentioned as having combined in his own person the offices of Dean of Worcester and Bishop of Rochester; and that the matters and things contained in the said pamphlet which relate to the alleged improper application of the funds of the Cathedral Church of Worcester were written and caused to be printed and published of, and concerning, the said Bishop of Rochester as such former Dean of Worcester. That the words of the said pamphlet next hereinafter mentioned and set forth [the passage was set forth] were written and caused to be printed and published by the prosecutor, of and concerning the said Bishop of Rochester for the time being, and were so written, printed, and published of, and concerning, the conduct of the said Dean and Chapter of Worcester during the time

that the said Bishop of Rochester was such Dean of Worcester as aforesaid, in and with such sense and meaning as follows, &c.; and that the prosecutor so wrote and caused to be printed and published the said pamphlet with the intent and for the purpose of thereby showing, as the fact was and is, that the deans and chapters of various cathedral churches, including therein the Dean and Chapter of Rochester and the Dean and Chapter of Worcester, during the time the said Bishop of Rochester was Dean of the said Cathedral Church of Worcester as aforesaid, have not respectively, duly, or properly applied, expended, or disposed of the revenues of the said cathedral churches respectively, according to the respective statutes of the founders thereof respectively, or the intentions of such respective founders. That the said Bishop of Rochester was such Dean of the Cathedral Church of Worcester as aforesaid within six years. That the prosecutor so wrote and caused to be printed and published the said pamphlet, and the said words hereinbefore set forth, with the intention of attributing to the said Dean and Chapter of Worcester, during the period that the said Bishop of Rochester was such Dean of Worcester as aforesaid, the same identical neglect and improper conduct with respect to the said Cathedral Church of Worcester, and in, and about, and with respect to the management, disposal, and application of the said funds and endowments relating thereto, as are charged or imputed against or to the said Dean and Chapter of Rochester with respect to the said Cathedral Church of Rochester, and in, and about, and with respect to the said management, disposal, and misapplication of the funds and endowments relating thereto. That divers passages in the said pamphlet contained were written and published with the intention of imputing to the said Bishop of Rochester, as visitor of the said Cathedral Church of Rochester, a knowledge of the misapplication of the funds and violation of the statutes of the said cathedral church by the said Dean and Chapter of Rochester, as well as a community of actions and proceedings with the said dean and chapter in the matter of the said appeal of the said Robert Whiston; and that the said dean and chapter have alleged and declared, under the common seal of the said cathedral church, that they removed the said Robert Whiston from his said office in consequence of his having written and published in the said pamphlet passages (untruly alleged to be) scandalous and libellous, and directed as well against the dean and canons of the said cathedral church as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches. That by reason of the said several premises the said Bishop of Rochester for the time being had, at the time of the said removal of the said Robert Whiston, and from thence hitherto continually has had, and still has, such an interest in the said cause of removal of the said Robert Whiston as aforesaid, as to disqualify the said bishop for the time being from acting as such visitor as aforesaid; and that by reason of the premises the said Robert Whiston ought not, nor was he bound or required by the said letters patent, ordinances, rules, and statutes, or otherwise by law, nor was it necessary or proper for him, the said Robert Whiston, according to

Regina v. The Dean and Chapter of Rochester.

the true intent and meaning of the said letters patent, ordinances, rules, and statutes, or otherwise, according to law, nor could he, nor ought he, to have appealed or to appeal to the said bishop, in order to obtain redress in respect of the said removal, or of the said cause of the said removal, or otherwise, in manner and form as in the said return alleged. Verification.

Third plea, that the prosecutor was elected, as in the return mentioned, in November, 1842, by the dean and chapter, into the office of head master of the said school; that he was at all times a proper person to hold the said office, and had properly conducted himself as such head master, and exerted himself to the utmost, and used his greatest labor and diligence to advance and improve the free scholars, and all others attending the said grammar school, in the instruction and education by the said letters patent and statutes directed to be provided and given in the said grammar school; that he was not inapt or unfit to teach and instruct the free scholars, and all others attending the said school; that he had not been guilty of any grave offence, in morals or in manners, or otherwise, within the true intent and meaning of the words "gravius delictum," in the statute "De Corrigendis Excessibus" mentioned, and that there was no ground for his removal by the dean and chapter, except as hereinafter mentioned; that though the revenues arising to the dean and chapter from the lands, which ought to have been applied, amongst other things, in the maintenance, alimony, and support, and in the increasing of the allowances of the said students and scholars, were greatly increased, no increase had been made in the allowance, maintenance, alimony, or support of the said students and scholars; that before the publication of the pamphlet hereinafter mentioned, the prosecutor respectfully represented to the dean and chapter that the letters patent and statutes were not complied with by them in respect of the maintenance, alimony, and support of the said students and scholars, and of the allowances so made by them in that behalf as aforesaid, and requested them to augment the same, which the dean and chapter had neglected and refused to do; that after such refusal he delivered an appeal in writing to the Bishop of Rochester, requesting him to direct that the said free scholars should receive an augmentation of their allowances; that the said bishop neglected and refused to inquire or adjudge upon, or into, the matters referred to in the said appeal; that afterwards the prosecutor published a pamphlet concerning the premises, intituled "Cathedral Trusts and their Fulfilment;" [the pamphlet was set out;] that the facts, statements, matters, and things alleged in the said pamphlet are true, and that the prosecutor believed, and still believes, them to be true; that on the 28th of June, 1849, the dean and chapter, by reason of a supposed offence alleged by them to have been committed by the prosecutor in writing and publishing the said pamphlet, resolved and ordered that he should be removed and displaced from the said office of head master of the said grammar school, and executed a deed poll to that effect, sealed with their common seal, and caused a copy of it to be delivered to the prosecutor; [the deed of removal was set out;] that the dean

Regina v. The Dean and Chapter of Rochester.

and chapter, for giving effect to the said deed poll, dispossessed and removed the prosecutor of and from his said office of head master, and interrupted him in the enjoyment of the houses, lands, fees, stipends, &c., to the said office of head master incident, belonging, or in any wise appertaining; that on the 11th of August, 1849, the dean and chapter caused to be delivered to the prosecutor a notice in writing, that they did not intend to take any further proceedings against him under the said instrument; [the notice was set out;] that the dean and chapter restored and reinstated the prosecutor to, and in, his said office of head master of the grammar school; that on the 10th of October, 1849, the dean and chapter adjudged that the prosecutor had been guilty of a great offence, by writing and publishing the said pamphlet, and had rendered himself liable to the penalties, punishments, and deprivations which they were by the statutes, and especially by the statute "*De Corrigendis Excessibus*," authorized or empowered to inflict; that on the 19th of October, 1849, the dean and chapter executed and delivered to the prosecutor another deed poll, sealed with their seal; [the deed of removal was set out;] that the supposed offence in the secondly-mentioned deed poll alleged against the prosecutor is the same identical supposed offence as the said supposed offence in the first-mentioned deed poll mentioned; and that there was never any cause for the removal of the prosecutor other than the writing and publishing the said pamphlet. Verification. Special demurrer, and joinder therein. The demurrer was argued¹ by

Sir F. Kelly, (*Cowling* was with him,) for the defendants. When a visitor has been appointed by the founder, there is no concurrent or other jurisdiction in this court to entertain an application for a *mandamus* by a person who has been dismissed from an office on the foundation; he must appeal to the visitor. *Philips v. Bury*, 2 T. R. 346. *Dr. Walker's Case*, Cas. t. Hardw. 212. *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10. It appears on the record, by the 38th statute of the founder of the cathedral church, "*De Visitatione Ecclesiæ*," that the Bishop of Rochester for the time being is appointed visitor, with all usual powers; and, therefore, *mandamus* will not lie, unless the visitor has refused to entertain the appeal from the decision of the dean and chapter in dismissing the applicant from his office of master. [He referred to the 4th and 26th statutes, "*De Officio Decani*," and "*De Pueris Grammaticis, et eorum Informatoribus*."] The 35th statute, "*De Corrigendis Excessibus*," ordains, that if any one of the minor canons, clerks, or other ministers com-

¹ April 26, before PATTESON, WIGHTMAN, and ERLE, JJ. Lord Campbell, C. J., was in the Court of Appeal in Criminal Cases. The argument was continued on April 30, when Lord Campbell, C. J., was present. The special grounds of demurrer were not argued.

In the first instance, *Sir F. Thesiger* moved for a prohibition in the Bail Court; but Patteson, J., before whom the motion was made, thought that remedy was not applicable, and suggested that a *mandamus* should be applied for, being of opinion that the dean and chapter could not contend that their act in dismissing the applicant was a void act.

Regina v. The Dean and Chapter of Rochester.

mits any trifling offence, he may be corrected by the dean or vice dean: "Sin gravius fuerit delictum, si justum judicabitur, ab iisdem expellatur a quibus fuerit admissus." The applicant was appointed by the dean and chapter, and, therefore, it was competent to them to dismiss him. The 38th statute gives the visitor a power to correct in the first instance, and by appeal also. *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10; and, therefore, by that statute, the visitor may decide whether the dean and chapter have done right, under stat. 35, in expelling the applicant. The cause or mode of expulsion cannot be called excess of jurisdiction. Therefore, the bishop is visitor of the school, and must be appealed to, unless the second plea is an answer. That plea sets up an objection to the jurisdiction of the visitor, upon the ground that he is interested in the question of the propriety of the dismissal of the applicant from his office, because the pamphlet for the publication of which he was dismissed reflects also upon the Bishop of Rochester. But this does not disqualify the Bishop of Rochester from hearing and deciding on the appeal, any more than a judge would be disqualified for trying an action brought for the dismissal of a servant who had been discharged by his master on account of his having published a libel upon that judge. The applicant seeks to avail himself of his own wrong. The question, whether the relative positions of the dean and chapter and of the master of the school were those of trustee and *cestui que trust*, has been before Wigram, V. C., in *Whiston v. The Dean and Chapter of Rochester*, 7 Hare, 533, who decided that this was not a case of trust, but that the master ought to be considered only as an officer of the cathedral church appointed for the purpose of performing one of the duties imposed upon the cathedral church by the statutes of the founder; and he said, (p. 561,) "If there be a visitor whose powers are not so circumscribed as to exclude the jurisdiction, I apprehend it is clear that the jurisdiction must be in that visitor, and that his decision upon the point is final." There was a motion for an appeal from that decision, but it was not prosecuted. The sufficiency of the cause of dismissal is not in issue upon these pleadings.

Sir F. Thesiger, (*W. D. Lewis* and *Rochfort Clarke* were with him,) contra. If it can be shown that the Bishop of Rochester is visitor *quoad hoc*, the question, whether or not the applicant has been dismissed for lawful cause, will not arise, as was decided in *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10. But the Bishop of Rochester, though general visitor, has no jurisdiction to entertain an appeal in this case, because the second plea shows that the applicant was dismissed from his office of master for the publication of a libel on the Bishop of Rochester as Dean of Worcester, as well as upon the Dean and Chapter of Rochester. Where the visitor has a personal interest in the subject matter of the inquiry, the law will qualify his general authority by suspending his power of acting in that case. As to the objection that the applicant cannot, by his own wrongful act, disable or disqualify the bishop from acting as visitor, suppose an indictment preferred for a libel on one of the judges, it would be

contrary to the principles of natural justice, and to the maxim, "Nemo iudex esse potest in sua causa," that the judge who was the subject of the alleged libel should preside on the trial of that indictment.

[*Patteson*, J. The case put by Sir F. Kelly, of an action by a servant dismissed for a libel upon a judge, is more analogous, because in that case the judge would be called upon to decide with the jury whether there was reasonable cause for the dismissal.]

In that case, it would not be necessary to decide whether the libel on the judge was true or not; but in this case, the bishop would have to decide on a matter which personally affected himself, and would virtually become a judge in his own cause; and, therefore, the visitatorial power of the bishop is *pro hac vice* suspended. *Ashurst*, J., in *Rex v. The Bishop of Ely*, 2 T. R. 290, 335. *The Attorney General v. Middleton*, 2 Ves. Sen. 326, 328. Com. Dig., "Visitor." *Rex v. The Bishop of Chester*, 2 Str. 797. 1 T. Barnard. 52. Stat. 2 Geo. 2, c. 29, to empower the king to visit the collegiate church of Manchester, was passed while the deanery of Manchester was held in commendam with the bishopric of Chester. [He also cited *Brookes v. Earl Rivers*, Hardr. 503.] In *Wood v. The Mayor and Commonalty of London*, Holt, 396; 1 Salk. 397, it was held, fourthly, that "though the mayor absents himself, and the recorder sits for him, and that by the custom of the city, yet it alters not the case, for though the recorder sits personally, yet it is legally the act of the mayor; the recorder is his deputy, and his act is the act of his superior;" which shows that the Bishop of Rochester could not visit by his chancellor. [He also cited *Reg. v. The Cheltenham Commissioners*, 1 Q. B. 467; 5 Jur. 867; *Reg. v. The Justices of Hertfordshire*, 6 Q. B. 753; 9 Jur. 424; and *Reg. v. The Aberdare Canal Commissioners*, 14 Jur. 735.] The decision of Lord Langdale, in *The Grand Junction Canal Company v. Dimes*, 12 Beav. 77; 13 Jur. 503, proceeded upon the ground that *ex necessitate* the lord chancellor must act as judge; but there is no such necessity in the case of the exercise of visitatorial powers; because, if the founder has not given the visitor authority to act as judge in a case in which he is interested, it is not to be implied that he has such authority. In *Rex v. The Bishop of Ely*, 2 T. R. 290, 338, Buller, J., said, "A visitor cannot be a judge in his own cause, unless that power be expressly given to him. A founder, indeed, may make him so, but such an authority is not to be implied; he cannot visit himself."

It may be questioned whether a founder could give that power. In *Day v. Savadge*, Hob. 85, 87, it is said, "Even an act of Parliament, made against natural equity, as to make a man judge in his own cause, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*. The visitor exercises a judicial authority in a summary and arbitrary manner, and without appeal. Then, if the return does not contain any traversable allegation that the applicant was dismissed for lawful cause, the second plea is sustained; but if there is such an allegation, the question whether there was a lawful cause arises upon the third plea, and the traverse in the second plea. Further, the dean

Regina v. The Dean and Chapter of Rochester.

of correction, whether it is a *gravius delictum*, such as calls for expulsion, or a *levis culpa*; and as to the poor, they are reserved to the judgment of the dean and chapter. The 38th statute gives a general power to the visitor to visit the cathedral, not only a power to correct in the first instance, but a similar power on appeal; and therefore, by that statute, the bishop, as visitor, may say whether the dean and chapter have done right, under the 35th section, in expelling the prosecutor. In *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10, it was contended, as here, that the office of chorister was exempt from the jurisdiction of the visitor of the cathedral church, but the court determined otherwise; they held, that the general visitatorial power enabled the bishop to determine whether the dean and chapter had done right in removing the prosecutor from his office, and, therefore, that this court could not interfere. The statutes of this cathedral cannot be distinguished from the statutes of the Cathedral Church of Chester.

The next question is, whether the course of proceeding which the dean and chapter have taken, in the expulsion of the applicant, is such an excess of jurisdiction as to call upon this court to interfere, though there is a visitor. But that the circumstances or manner of the dismissal cannot oust the visitor of his jurisdiction is laid down in a great variety of cases: they do not make it a matter of discretion with us whether we should interfere by *mandamus*. Therefore, the bishop is the visitor, as regards the grammar school, and must be appealed to, unless the second plea interferes with his authority.

This brings us to the argument founded upon the second plea, which does not deny that the bishop is general visitor, but states, in substance, that the applicant had written and published a pamphlet, in which were strong reflections upon the conduct of the Bishop of Rochester when Dean of Worcester, and also upon his conduct as visitor of the Cathedral of Rochester; and that the dean and chapter removed him from his office in consequence of the reflections which he had made, as well against the dean and canons of the Cathedral Church of Rochester as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches; and concludes with alleging, that the bishop had such an interest in the cause of removal of the applicant as to disqualify him from acting as visitor. If he is general visitor, he comes within the decision of this court in *Reg. v. The Bishop of Chester*, 15 Jur. 10. On the argument, some cases were cited, *Day v. Savadge*, Hob. 85, 87; *Brookes v. Earl Rivers*, Hardr. 503; *Wood v. The Mayor and Commonalty of London*, Holt, 396; 1 Salk. 397; *Rex v. The Bishop of Chester*, 2 Str. 797; 1 T. Barnard. 52; *Rex v. The Bishop of Ely*, 2 T. R. 290, 335; and also some cases relating to magistrates, in which are strong expressions to the effect that a man cannot be judge in his own cause. But the only question in this case is, whether the plea discloses such an interest as makes the bishop a judge in his own cause. By the 26th statute, "*De Pueris Grammaticis, et eorum Informatoribus*," the master of the grammar school shall be elected by the dean and chapter; the bishop never appoints him. In *Rex v. The Bishop of Ely*, 2 T. R. 290, the bishop

Regina v. The Dean and Chapter of Rochester.

and chapter, and not the bishop, are the visitors of the grammar school. The 35th statute, "*De Corrigendis Excessibus*," gives to the dean and chapter the power of expelling from their office, *si gravius fuerit delictum*, those officers whom they appoint. [He also referred to the 26th statute, "*De Pueris Grammaticis, et eorum Informatoribus*."] The clause in the 38th statute, "*De Visitatione Ecclesiæ*," "*Quos quidem omnes tam decanum quam canonicos et alios ecclesiæ nostræ ministros quoad omnia præmissa volumus et mandamus ipsi episcopo parere et obedire*," would not have the effect of taking away the visitatorial power of the dean and chapter, because the founder has, by the 35th statute, made the decision of the dean and chapter in this matter final; and, therefore, the dean and chapter might refuse to obey the bishop in this matter. The letters patent and the statutes make a distinction between officers of that degree, within which the master of the grammar school is, and officers of a higher degree.

[*Lord Campbell, C. J.* In some instances, the visitor has original jurisdiction; there may be original jurisdiction in one person, and appellate jurisdiction in another.]

It is not an inflexible rule that a party who complains of a wrongful dismissal from his office should resort to the visitor before he applies to this court. Further, it is a question whether the publication of a pamphlet, which merely alleges that the dean and chapter had not observed the will of the founder, is *gravius delictum*, within the 35th statute.

[*Patteson, J.* Whether an act, and the manner of doing it, is *gravius delictum*, is a question of fact.]

Further, the dean and chapter exercised their jurisdiction contrary to law, in punishing the applicant twice for the same offence, by dismissing him twice from his office, as shown by the third plea.

Sir F. Kelly was not heard in reply.

PATTESON, J. The great question is, Who is the visitor of the grammar school of the Cathedral Church of Rochester? If the bishop is visitor, it was admitted that his general visitatorial power would have extended to this case, unless the second plea showed a personal interest in the bishop, disqualifying him from acting as visitor. But, further, it was contended that the 35th statute shows that the dean and chapter, and not the bishop, are the visitors of the grammar school.

First, as to the question whether the bishop is visitor, and can interfere with the grammar school. The 35th statute, "*De Corrigendis Excessibus*," does not appoint a visitor, properly so called; it directs who are the parties to judge if any of the minor canons, clerks, or other ministers had offended *in levi culpa*, and in case of a *gravius delictum* it gives the power of expulsion to the persons by whom the delinquent was admitted. Therefore, the dean and chapter are the persons who would have to determine as to the propriety of expelling any inferior officers whom they had appointed. The same statute goes on to provide for offences committed by the canons; and in their case the bishop is made the judge in the first instance, for the purpose

Regina v. The Dean and Chapter of Rochester.

of correction, whether it is a *gravius delictum*, such as calls for expulsion, or a *levis culpa*; and as to the poor, they are reserved to the judgment of the dean and chapter. The 38th statute gives a general power to the visitor to visit the cathedral, not only a power to correct in the first instance, but a similar power on appeal; and therefore, by that statute, the bishop, as visitor, may say whether the dean and chapter have done right, under the 35th section, in expelling the prosecutor. In *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10, it was contended, as here, that the office of chorister was exempt from the jurisdiction of the visitor of the cathedral church, but the court determined otherwise; they held, that the general visitatorial power enabled the bishop to determine whether the dean and chapter had done right in removing the prosecutor from his office, and, therefore, that this court could not interfere. The statutes of this cathedral cannot be distinguished from the statutes of the Cathedral Church of Chester.

The next question is, whether the course of proceeding which the dean and chapter have taken, in the expulsion of the applicant, is such an excess of jurisdiction as to call upon this court to interfere, though there is a visitor. But that the circumstances or manner of the dismissal cannot oust the visitor of his jurisdiction is laid down in a great variety of cases: they do not make it a matter of discretion with us whether we should interfere by *mandamus*. Therefore, the bishop is the visitor, as regards the grammar school, and must be appealed to, unless the second plea interferes with his authority.

This brings us to the argument founded upon the second plea, which does not deny that the bishop is general visitor, but states, in substance, that the applicant had written and published a pamphlet, in which were strong reflections upon the conduct of the Bishop of Rochester when Dean of Worcester, and also upon his conduct as visitor of the Cathedral of Rochester; and that the dean and chapter removed him from his office in consequence of the reflections which he had made, as well against the dean and canons of the Cathedral Church of Rochester as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches; and concludes with alleging, that the bishop had such an interest in the cause of removal of the applicant as to disqualify him from acting as visitor. If he is general visitor, he comes within the decision of this court in *Reg. v. The Bishop of Chester*, 15 Jur. 10. On the argument, some cases were cited, *Day v. Savadge*, Hob. 85, 87; *Brookes v. Earl Rivers*, Hardr. 503; *Wood v. The Mayor and Commonalty of London*, Holt, 396; 1 Salk. 397; *Rex v. The Bishop of Chester*, 2 Str. 797; 1 T. Barnard. 52; *Rex v. The Bishop of Ely*, 2 T. R. 290, 335; and also some cases relating to magistrates, in which are strong expressions to the effect that a man cannot be judge in his own cause. But the only question in this case is, whether the plea discloses such an interest as makes the bishop a judge in his own cause. By the 26th statute, "*De Pueris Grammaticis, et eorum Informatoribus*," the master of the grammar school shall be elected by the dean and chapter; the bishop never appoints him. In *Rex v. The Bishop of Ely*, 2 T. R. 290, the bishop

Regina v. The Dean and Chapter of Rochester.

appointed the master, and the act commanded was to be done by him as elector; and so, in all the other cases, the interest of the visitor was direct; here the bishop has no direct interest in the subject matter. It was argued, that the applicant having been removed for an alleged libel upon the dean and chapter, because the bishop was included in that libel, he had an interest in upholding the decision of the dean and chapter. But the removal of the applicant was the act of the dean and chapter; the bishop was not a party to that act, nor has any interest in it. It is not a question whether there has been a misapplication of the funds of the cathedral, nor whether the reflections in the pamphlet, if libellous, were justifiable or not. There is no interest in the bishop, unless the question will be, whether the applicant was improperly punished for a libel upon the bishop. But that is not so. In *Brookes v. Earl Rivers*, Hardr. 503, a prohibition was refused; and the court said that favor should not be presumed in a judge. The questions on the third plea do not arise. I am, therefore, of opinion that there should be judgment for the Dean and Chapter of Rochester.

WIGHTMAN, J. With respect to the argument that the dean and chapter were visitors *quoad hoc*, and that the general power of the visitor does not apply where there is a particular power, I am of opinion that the dean and chapter did not, in expelling the prosecutor from his office, act as visitor, nor is there any thing in the 35th statute which gives them authority to act as visitor. By that statute, they have power to expel those officers whom they have appointed, for certain offences, but that is *si gravius fuerit delictum (si justum judicabitur)*. If it should happen that the dean and chapter are guilty of excess or wrong in the mode in which they exercise that power, the question is, What remedy is given? Under the general powers created in the 38th statute, the office of visitor is vested in the bishop. Then, if the founder has appointed a visitor, this court has no jurisdiction to grant a *mandamus*. Now, the terms in which authority is given to the visitor by that statute are most general: "Omniaque faciat quæ ad visitatoris officium de jure pertinere denoscuntur." If any mistake is committed by those who are mentioned previously, the bishop is the person who has a general supervision. The power which the dean and chapter have of removing the master of the grammar school is similar to that which resides in the colleges of our universities to remove members for cause which appears to them to be sufficient. This case, therefore, is not distinguishable from *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10. With respect to the other objection, my brother Patteson has already expressed the opinion which I entertain.

ERLE, J. The first question is, whether the bishop has power to remove the master of the cathedral grammar school on the ground alleged in the return. By the 35th statute, the dean and chapter have original jurisdiction to expel certain officers, and among them the master of the grammar school, for any *gravius delictum*; and by the 38th statute, the visitor has appellate jurisdiction. The 38th statute

Doe d. Hudson v. The Leeds and Bradford Railway Company.

expressly directs the visitor to expel, if the dean and chapter have omitted to do so. It follows that the bishop is to decide the matter, where a party has been removed from his office, and he alleges that he has been wrongfully removed. The second question is, whether, by the removal of the prosecutor, there has been such excess of jurisdiction as that the dean and chapter have no right to say that they acted within their jurisdiction. The ground of the removal alleged in the plea, and which is admitted by the demurrer, is the publication of a pamphlet containing passages alleged by the dean and chapter to be libellous upon them. The pamphlet may be so libellous as to be a *gravius delictum* within the 35th statute, and that is a question for the dean and chapter; they have general jurisdiction. The third question was, whether, supposing the visitor had jurisdiction, he had lost it by personal interest. I agree with my brother Patteson that the bishop has not any personal interest in the matter.

LORD CAMPBELL, C. J. Having been absent during the argument on Wednesday last, I did not think it right to give my opinion until my learned brothers had decided the case; but they having now decided it, I wish to say that I entirely concur in their decision. Sir Frederick Thesiger founds the whole of his argument upon the 35th statute, which gives to the dean and chapter the power of expelling the master of the grammar school, *si gravius fuerit delictum*; but the power there given to them is consistent with their being subject to the visitor, who may revise what they have done under it. That being so, there would be properly an appeal to the visitor, unless he is disqualified by interest in the cause; but the bishop is not a party to the cause, neither has he such an interest as disqualifies him. It might just as well be said that if the master of the grammar school had been guilty of publishing a libel on the judges of the Queen's Bench, and had been dismissed on that ground, we should be disqualified for hearing an application for a *mandamus* to restore him.

Rule discharged.

DOE d. HUDSON v. THE LEEDS AND BRADFORD RAILWAY COMPANY.¹

Easter Term, April 23, 1851.

Railway Company — Right to take Land — Possession — Ejectment.

A special railway act contained the usual clauses giving the company powers for the compulsory purchase of lands; and, by sect. 158, the company were not, except by the consent of the owner, to enter upon any lands which were required for the purposes of the act, until they had paid or deposited in the Bank of England the purchase money or compensation agreed or awarded to be paid. In 1845, the lessor of the plaintiff permitted the company to enter upon certain land, and agreed to refer the amount of compensation to an arbitrator; and in 1847 the company entered, and continued in possession until 1849, when the lessor of the plaintiff demanded possession:—

¹ 15 Jur. 946.

Doe d. Hudson v. The Leeds and Bradford Railway Company.

Held, that such demand of possession did not make the company trespassers, and that ejectment could not be maintained against them.

EJECTMENT to recover a piece of land adjoining to the River Aire. On the trial, before Cresswell, J., at the Spring assizes at York, it appeared that, on the 4th of July, 1844, the royal assent was given to the act 7 & 8 Vict. c. 59, by which the Leeds and Bradford Railway Company were empowered to make a railway from Leeds to Bradford, with a branch to the North Midland Railway. The act contained the usual clauses giving the company powers for the compulsory purchase of lands, including the land in question, which, by sect. 313, were to cease after the expiration of seven years from the passing of the act. On the 29th of December, 1845, the lessor of the plaintiff entered into an agreement, by which he permitted the defendants to enter upon the land in question, and agreed to refer the amount of compensation to be paid to him to an arbitrator. This agreement was modified by another agreement in 1847. The defendants entered upon and took possession of the land under this agreement, and also sunk a tank on land not belonging to the lessor of the plaintiff. The lessor of the plaintiff was the proprietor of ancient mills on the River Aire, and was entitled to sufficient water of that river for working them. On the reference there was a question whether the injury done to the lessor of the plaintiff, in taking water from the River Aire by means of the tank, was included in the terms of the second agreement or not. On the 9th of May, 1849, the arbitrator made his award, by which he awarded to the lessor of the plaintiff 5023*l.* as compensation for the value of the land, and for the injury done by the works of the defendants. After the award, and in the course of the discussion as to the terms of the conveyance of the land in question to the defendants, the dispute on the question raised during the reference was renewed; and, finally, the lessor of the plaintiff gave notice to the defendants to quit and deliver up possession of the land. It was contended for the lessor of the plaintiff, that the defendants, having been let into possession with the consent of the lessor of the plaintiff, were tenants at will, and that he was entitled to determine that will by notice, and to bring ejectment. The learned judge was of opinion that the defendants were entitled to a verdict upon the provisions of stat. 7 & 8 Vict. c. 59,¹ which gave them a right to enter upon the land; and the verdict was entered accordingly, leave being reserved to move to enter a verdict for the lessor of the plaintiff.

¹ By sect. 137 of stat. 7 & 8 Vict. c. 59, it is enacted, "that, subject to the provisions of this act, it shall be lawful for the company to agree with the owners of the lands, which they are hereby authorized to enter into and take for the purposes of the railway, for the absolute purchase for a consideration in money of any such lands, or such parts thereof, as they shall think proper, and of all subsisting leases therein."

By sect. 158 it is enacted, "that the company shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this act, until they shall either have paid to every party having an interest in such lands, or deposited in the Bank of England in the

Doe d. Hudson v. The Leeds and Bradford Railway Company.

Knowles now moved accordingly. Where a vendor agrees to sell to a vendee, and the treaty for the purchase goes off, the vendee is only tenant at will. This transaction was before the passing of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, under which *Doe d. Armistead v. The North Staffordshire Railway Company*, 15 Jur. 944; s. c. 4 Eng. Rep. 216, was decided. In that case, the land of the lessor of the plaintiff was taken *in invitum* by proceedings under sect. 68 of stat. 8 & 9 Vict. c. 18, and the compensation money was deposited in the Bank of England. Here the defendants derive all their power from sect. 158 of stat. 7 & 8 Vict. c. 49.

LORD CAMPBELL, C. J. I am of opinion that the learned judge was quite right in holding that ejectment was not maintainable. Under their special act the defendants had a right, by proceeding in a specified manner, to take possession of the land in question. Instead of pursuing that course, there is a reference to an arbitrator to fix the value of the land, and the compensation to be paid to the lessor of the plaintiff; and in the mean time he consents that the defendants shall take possession, and probably lay out money in constructing their works. Mr. Knowles is driven to contend, that during all this time the defendants are mere tenants at will, and liable to be turned out by demand of possession; but I am clearly of opinion that such is not the interest which they possessed in the land, and, therefore, they are not liable to be made trespassers by a demand of possession. And there is no hardship on the lessor of the plaintiff, because he has under the award of the arbitrator, to whom he agreed to refer the amount of compensation, a remedy for recovering the value of his land as effectual as the lessor of the plaintiff had in *Doe d. Armistead v. The North Staffordshire Railway Company*.

PATTESON, J. Under their special act the defendants cannot enter upon lands, which they have power to take in a compulsory manner, until compensation be made, except by consent of the owner. In this case the consent of the owner was given, and nothing remained but to settle the amount of the compensation; otherwise, if the land owner was not satisfied with the amount awarded to him, he might revoke his consent, and make the company trespassers, which would open a door to the exercise of great oppression on railway companies.

WIGHTMAN and ERLE, JJ., concurred.

Rule refused.

manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein."

By sect. 136 it is enacted, "that, subject to the provisions and restrictions in this act contained, it shall be lawful for the company to make and maintain the said railway and works on the line and upon the lands delineated and described on the plans and in the books of reference hereinafter mentioned, or in the schedule hereto, and for that purpose to enter upon, take, and use such of the lands so delineated and described as shall be necessary for making and constructing the said railway and works."

Sivewright v. Archibald.

evidence is inadmissible because a sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are, by presumption of law, a contract in writing. I think they are not.

If bought and sold notes which agree are delivered and accepted without objection, such acceptance without objection is evidence for the jury of mutual assent to the terms of the notes; but the assent is to be inferred by the jury from their acceptance of the notes without objection—not from the signature to the writing, which would be the proof if they constituted a contract in writing. This seems to me to be the effect of the evidence of mercantile usage relating to bought and sold notes given in *Hawes v. Foster*, 1 Moo. & R. 368, mentioned below; and this is the ground on which the verdict in that case is to be sustained, according to the opinion of Parke, B., expressed in *Thornton v. Charles*, 9 M. & W. 802, 807.

The form of the instruments is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done on his behalf. The buyer is informed of his purchase, the seller of his sale, and experience shows that they are varied as mercantile convenience may dictate. Both may be sent, or one, or neither; they may both be signed by the broker, or one by him and the other by the party; the names of both contractors may be mentioned, or one may be named and the other described; they may be sent at the time of the contract, or after, or one at an interval after the other.

No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. The governing principle in respect of contracts is to give effect to the intention of the parties; and where the intention to contract is clear, it seems contrary to that principle to defeat it, because bought and sold notes have been delivered which disagree. They are then held to constitute the contract only for the purpose of annulling it.

It seems to me, therefore, that, upon principle, the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree.

Before examining the authorities on which this proposition is supposed to be founded, I would draw attention to the distinction between evidence of a contract and evidence of a compliance with the Statute of Frauds. The question of compliance with the statute does not arise until the contract is in proof. In case of a written contract, the statute has no application. In case of other contracts the compliance may be proved by part payment, or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing, in that it may be made at any time after

Regina v. The Dean and Chapter of Rochester.

and chapter, and not the bishop, are the visitors of the grammar school. The 35th statute, "De Corrigendis Excessibus," gives to the dean and chapter the power of expelling from their office, *si gravius fuerit delictum*, those officers whom they appoint. [He also referred to the 26th statute, "De Pueris Grammaticis, et eorum Informatoribus."] The clause in the 38th statute, "De Visitatione Ecclesiæ," "Quos quidem omnes tam decanum quam canonicos et alios ecclesiæ nostræ ministros quoad omnia præmissa volumus et mandamus ipsi episcopo parere et obedire," would not have the effect of taking away the visitatorial power of the dean and chapter, because the founder has, by the 35th statute, made the decision of the dean and chapter in this matter final; and, therefore, the dean and chapter might refuse to obey the bishop in this matter. The letters patent and the statutes make a distinction between officers of that degree, within which the master of the grammar school is, and officers of a higher degree.

[Lord Campbell, C. J. In some instances, the visitor has original jurisdiction; there may be original jurisdiction in one person, and appellate jurisdiction in another.]

It is not an inflexible rule that a party who complains of a wrongful dismissal from his office should resort to the visitor before he applies to this court. Further, it is a question whether the publication of a pamphlet, which merely alleges that the dean and chapter had not observed the will of the founder, is *gravius delictum*, within the 35th statute.

[Patteson, J. Whether an act, and the manner of doing it, is *gravius delictum*, is a question of fact.]

Further, the dean and chapter exercised their jurisdiction contrary to law, in punishing the applicant twice for the same offence, by dismissing him twice from his office, as shown by the third plea.

Sir F. Kelly was not heard in reply.

PATTESON, J. The great question is, Who is the visitor of the grammar school of the Cathedral Church of Rochester? If the bishop is visitor, it was admitted that his general visitatorial power would have extended to this case, unless the second plea showed a personal interest in the bishop, disqualifying him from acting as visitor. But, further, it was contended that the 35th statute shows that the dean and chapter, and not the bishop, are the visitors of the grammar school.

First, as to the question whether the bishop is visitor, and can interfere with the grammar school. The 35th statute, "De Corrigendis Excessibus," does not appoint a visitor, properly so called; it directs who are the parties to judge if any of the minor canons, clerks, or other ministers had offended *in levi culpa*, and in case of a *gravius delictum* it gives the power of expulsion to the persons by whom the delinquent was admitted. Therefore, the dean and chapter are the persons who would have to determine as to the propriety of expelling any inferior officers whom they had appointed. The same statute goes on to provide for offences committed by the canons; and in their case the bishop is made the judge in the first instance, for the purpose

Regina v. The Dean and Chapter of Rochester.

of correction, whether it is a *gravius delictum*, such as calls for expulsion, or a *levis culpa*; and as to the poor, they are reserved to the judgment of the dean and chapter. The 38th statute gives a general power to the visitor to visit the cathedral, not only a power to correct in the first instance, but a similar power on appeal; and therefore, by that statute, the bishop, as visitor, may say whether the dean and chapter have done right, under the 35th section, in expelling the prosecutor. In *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10, it was contended, as here, that the office of chorister was exempt from the jurisdiction of the visitor of the cathedral church, but the court determined otherwise; they held, that the general visitatorial power enabled the bishop to determine whether the dean and chapter had done right in removing the prosecutor from his office, and, therefore, that this court could not interfere. The statutes of this cathedral cannot be distinguished from the statutes of the Cathedral Church of Chester.

The next question is, whether the course of proceeding which the dean and chapter have taken, in the expulsion of the applicant, is such an excess of jurisdiction as to call upon this court to interfere, though there is a visitor. But that the circumstances or manner of the dismissal cannot oust the visitor of his jurisdiction is laid down in a great variety of cases: they do not make it a matter of discretion with us whether we should interfere by *mandamus*. Therefore, the bishop is the visitor, as regards the grammar school, and must be appealed to, unless the second plea interferes with his authority.

This brings us to the argument founded upon the second plea, which does not deny that the bishop is general visitor, but states, in substance, that the applicant had written and published a pamphlet, in which were strong reflections upon the conduct of the Bishop of Rochester when Dean of Worcester, and also upon his conduct as visitor of the Cathedral of Rochester; and that the dean and chapter removed him from his office in consequence of the reflections which he had made, as well against the dean and canons of the Cathedral Church of Rochester as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches; and concludes with alleging, that the bishop had such an interest in the cause of removal of the applicant as to disqualify him from acting as visitor. If he is general visitor, he comes within the decision of this court in *Reg. v. The Bishop of Chester*, 15 Jur. 10. On the argument, some cases were cited, *Day v. Savadge*, Hob. 85, 87; *Brookes v. Earl Rivers*, Hardr. 503; *Wood v. The Mayor and Commonalty of London*, Holt, 396; 1 Salk. 397; *Rex v. The Bishop of Chester*, 2 Str. 797; 1 T. Barnard. 52; *Rex v. The Bishop of Ely*, 2 T. R. 290, 335; and also some cases relating to magistrates, in which are strong expressions to the effect that a man cannot be judge in his own cause. But the only question in this case is, whether the plea discloses such an interest as makes the bishop a judge in his own cause. By the 26th statute, "*De Pueris Grammaticis, et eorum Informatoribus*," the master of the grammar school shall be elected by the dean and chapter; the bishop never appoints him. In *Rex v. The Bishop of Ely*, 2 T. R. 290, the bishop

Regina v. The Dean and Chapter of Rochester.

appointed the master, and the act commanded was to be done by him as elector; and so, in all the other cases, the interest of the visitor was direct; here the bishop has no direct interest in the subject matter. It was argued, that the applicant having been removed for an alleged libel upon the dean and chapter, because the bishop was included in that libel, he had an interest in upholding the decision of the dean and chapter. But the removal of the applicant was the act of the dean and chapter; the bishop was not a party to that act, nor has any interest in it. It is not a question whether there has been a misapplication of the funds of the cathedral, nor whether the reflections in the pamphlet, if libellous, were justifiable or not. There is no interest in the bishop, unless the question will be, whether the applicant was improperly punished for a libel upon the bishop. But that is not so. In *Brookes v. Earl Rivers*, Hardr. 503, a prohibition was refused; and the court said that favor should not be presumed in a judge. The questions on the third plea do not arise. I am, therefore, of opinion that there should be judgment for the Dean and Chapter of Rochester.

WIGHTMAN, J. With respect to the argument that the dean and chapter were visitors *quoad hoc*, and that the general power of the visitor does not apply where there is a particular power, I am of opinion that the dean and chapter did not, in expelling the prosecutor from his office, act as visitor, nor is there any thing in the 35th statute which gives them authority to act as visitor. By that statute, they have power to expel those officers whom they have appointed, for certain offences, but that is *si gravius fuerit delictum (si justum judicabitur)*. If it should happen that the dean and chapter are guilty of excess or wrong in the mode in which they exercise that power, the question is, What remedy is given? Under the general powers created in the 38th statute, the office of visitor is vested in the bishop. Then, if the founder has appointed a visitor, this court has no jurisdiction to grant a *mandamus*. Now, the terms in which authority is given to the visitor by that statute are most general: "*Omniaque faciat quæ ad visitatoris officium de jure pertinere denoscuntur.*" If any mistake is committed by those who are mentioned previously, the bishop is the person who has a general supervision. The power which the dean and chapter have of removing the master of the grammar school is similar to that which resides in the colleges of our universities to remove members for cause which appears to them to be sufficient. This case, therefore, is not distinguishable from *Reg. v. The Dean and Chapter of Chester*, 15 Jur. 10. With respect to the other objection, my brother Patteson has already expressed the opinion which I entertain.

ERLE, J. The first question is, whether the bishop has power to remove the master of the cathedral grammar school on the ground alleged in the return. By the 35th statute, the dean and chapter have original jurisdiction to expel certain officers, and among them the master of the grammar school, for any *gravius delictum*; and by the 38th statute, the visitor has appellate jurisdiction. The 38th statute

Doe d. Hudson v. The Leeds and Bradford Railway Company.

expressly directs the visitor to expel, if the dean and chapter have omitted to do so. It follows that the bishop is to decide the matter, where a party has been removed from his office, and he alleges that he has been wrongfully removed. The second question is, whether, by the removal of the prosecutor, there has been such excess of jurisdiction as that the dean and chapter have no right to say that they acted within their jurisdiction. The ground of the removal alleged in the plea, and which is admitted by the demurrer, is the publication of a pamphlet containing passages alleged by the dean and chapter to be libellous upon them. The pamphlet may be so libellous as to be a *gravius delictum* within the 35th statute, and that is a question for the dean and chapter; they have general jurisdiction. The third question was, whether, supposing the visitor had jurisdiction, he had lost it by personal interest. I agree with my brother Patteson that the bishop has not any personal interest in the matter.

LORD CAMPBELL, C. J. Having been absent during the argument on Wednesday last, I did not think it right to give my opinion until my learned brothers had decided the case; but they having now decided it, I wish to say that I entirely concur in their decision. Sir Frederick Thesiger founds the whole of his argument upon the 35th statute, which gives to the dean and chapter the power of expelling the master of the grammar school, *si gravius fuerit delictum*; but the power there given to them is consistent with their being subject to the visitor, who may revise what they have done under it. That being so, there would be properly an appeal to the visitor, unless he is disqualified by interest in the cause; but the bishop is not a party to the cause, neither has he such an interest as disqualifies him. It might just as well be said that if the master of the grammar school had been guilty of publishing a libel on the judges of the Queen's Bench, and had been dismissed on that ground, we should be disqualified for hearing an application for a *mandamus* to restore him.

Rule discharged.

DOE d. HUDSON v. THE LEEDS AND BRADFORD RAILWAY COMPANY.¹

Easter Term, April 23, 1851.

Railway Company — Right to take Land — Possession — Ejectment.

A special railway act contained the usual clauses giving the company powers for the compulsory purchase of lands; and, by sect. 158, the company were not, except by the consent of the owner, to enter upon any lands which were required for the purposes of the act, until they had paid or deposited in the Bank of England the purchase money or compensation agreed or awarded to be paid. In 1845, the lessor of the plaintiff permitted the company to enter upon certain land, and agreed to refer the amount of compensation to an arbitrator; and in 1847 the company entered, and continued in possession until 1849, when the lessor of the plaintiff demanded possession:—

¹ 15 Jur. 946.

Doe d. Hudson v. The Leeds and Bradford Railway Company.

Held, that such demand of possession did not make the company trespassers, and that ejectment could not be maintained against them.

EJECTMENT to recover a piece of land adjoining to the River Aire. On the trial, before Cresswell, J., at the Spring assizes at York, it appeared that, on the 4th of July, 1844, the royal assent was given to the act 7 & 8 Vict. c. 59, by which the Leeds and Bradford Railway Company were empowered to make a railway from Leeds to Bradford, with a branch to the North Midland Railway. The act contained the usual clauses giving the company powers for the compulsory purchase of lands, including the land in question, which, by sect. 313, were to cease after the expiration of seven years from the passing of the act. On the 29th of December, 1845, the lessor of the plaintiff entered into an agreement, by which he permitted the defendants to enter upon the land in question, and agreed to refer the amount of compensation to be paid to him to an arbitrator. This agreement was modified by another agreement in 1847. The defendants entered upon and took possession of the land under this agreement, and also sunk a tank on land not belonging to the lessor of the plaintiff. The lessor of the plaintiff was the proprietor of ancient mills on the River Aire, and was entitled to sufficient water of that river for working them. On the reference there was a question whether the injury done to the lessor of the plaintiff, in taking water from the River Aire by means of the tank, was included in the terms of the second agreement or not. On the 9th of May, 1849, the arbitrator made his award, by which he awarded to the lessor of the plaintiff 5023*l.* as compensation for the value of the land, and for the injury done by the works of the defendants. After the award, and in the course of the discussion as to the terms of the conveyance of the land in question to the defendants, the dispute on the question raised during the reference was renewed; and, finally, the lessor of the plaintiff gave notice to the defendants to quit and deliver up possession of the land. It was contended for the lessor of the plaintiff, that the defendants, having been let into possession with the consent of the lessor of the plaintiff, were tenants at will, and that he was entitled to determine that will by notice, and to bring ejectment. The learned judge was of opinion that the defendants were entitled to a verdict upon the provisions of stat. 7 & 8 Vict. c. 59,¹ which gave them a right to enter upon the land; and the verdict was entered accordingly, leave being reserved to move to enter a verdict for the lessor of the plaintiff.

¹ By sect. 137 of stat. 7 & 8 Vict. c. 59, it is enacted, "that, subject to the provisions of this act, it shall be lawful for the company to agree with the owners of the lands, which they are hereby authorized to enter into and take for the purposes of the railway, for the absolute purchase for a consideration in money of any such lands, or such parts thereof, as they shall think proper, and of all subsisting leases therein."

By sect. 158 it is enacted, "that the company shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this act, until they shall either have paid to every party having an interest in such lands, or deposited in the Bank of England in the

Doe d. Hudson v. The Leeds and Bradford Railway Company.

Knowles now moved accordingly. Where a vendor agrees to sell to a vendee, and the treaty for the purchase goes off, the vendee is only tenant at will. This transaction was before the passing of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, under which *Doe d. Armistead v. The North Staffordshire Railway Company*, 15 Jur. 944; s. c. 4 Eng. Rep. 216, was decided. In that case, the land of the lessor of the plaintiff was taken *in invitum* by proceedings under sect. 68 of stat. 8 & 9 Vict. c. 18, and the compensation money was deposited in the Bank of England. Here the defendants derive all their power from sect. 158 of stat. 7 & 8 Vict. c. 49.

LORD CAMPBELL, C. J. I am of opinion that the learned judge was quite right in holding that ejectment was not maintainable. Under their special act the defendants had a right, by proceeding in a specified manner, to take possession of the land in question. Instead of pursuing that course, there is a reference to an arbitrator to fix the value of the land, and the compensation to be paid to the lessor of the plaintiff; and in the mean time he consents that the defendants shall take possession, and probably lay out money in constructing their works. Mr. Knowles is driven to contend, that during all this time the defendants are mere tenants at will, and liable to be turned out by demand of possession; but I am clearly of opinion that such is not the interest which they possessed in the land, and, therefore, they are not liable to be made trespassers by a demand of possession. And there is no hardship on the lessor of the plaintiff, because he has under the award of the arbitrator, to whom he agreed to refer the amount of compensation, a remedy for recovering the value of his land as effectual as the lessor of the plaintiff had in *Doe d. Armistead v. The North Staffordshire Railway Company*.

PATTESON, J. Under their special act the defendants cannot enter upon lands, which they have power to take in a compulsory manner, until compensation be made, except by consent of the owner. In this case the consent of the owner was given, and nothing remained but to settle the amount of the compensation; otherwise, if the land owner was not satisfied with the amount awarded to him, he might revoke his consent, and make the company trespassers, which would open a door to the exercise of great oppression on railway companies.

WIGHTMAN and ERLE, JJ., concurred.

Rule refused.

manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein."

By sect. 136 it is enacted, "that, subject to the provisions and restrictions in this act contained, it shall be lawful for the company to make and maintain the said railway and works on the line and upon the lands delineated and described on the plans and in the books of reference hereinafter mentioned, or in the schedule hereto, and for that purpose to enter upon, take, and use such of the lands so delineated and described as shall be necessary for making and constructing the said railway and works."

Doe d. Hudson v. The Leeds and Bradford Railway Company.

Held, that such demand of possession did not make the company trespassers, and that ejectment could not be maintained against them.

EJECTMENT to recover a piece of land adjoining to the River Aire. On the trial, before Cresswell, J., at the Spring assizes at York, it appeared that, on the 4th of July, 1844, the royal assent was given to the act 7 & 8 Vict. c. 59, by which the Leeds and Bradford Railway Company were empowered to make a railway from Leeds to Bradford, with a branch to the North Midland Railway. The act contained the usual clauses giving the company powers for the compulsory purchase of lands, including the land in question, which, by sect. 313, were to cease after the expiration of seven years from the passing of the act. On the 29th of December, 1845, the lessor of the plaintiff entered into an agreement, by which he permitted the defendants to enter upon the land in question, and agreed to refer the amount of compensation to be paid to him to an arbitrator. This agreement was modified by another agreement in 1847. The defendants entered upon and took possession of the land under this agreement, and also sunk a tank on land not belonging to the lessor of the plaintiff. The lessor of the plaintiff was the proprietor of ancient mills on the River Aire, and was entitled to sufficient water of that river for working them. On the reference there was a question whether the injury done to the lessor of the plaintiff, in taking water from the River Aire by means of the tank, was included in the terms of the second agreement or not. On the 9th of May, 1849, the arbitrator made his award, by which he awarded to the lessor of the plaintiff 5023*l.* as compensation for the value of the land, and for the injury done by the works of the defendants. After the award, and in the course of the discussion as to the terms of the conveyance of the land in question to the defendants, the dispute on the question raised during the reference was renewed; and, finally, the lessor of the plaintiff gave notice to the defendants to quit and deliver up possession of the land. It was contended for the lessor of the plaintiff, that the defendants, having been let into possession with the consent of the lessor of the plaintiff, were tenants at will, and that he was entitled to determine that will by notice, and to bring ejectment. The learned judge was of opinion that the defendants were entitled to a verdict upon the provisions of stat. 7 & 8 Vict. c. 59,¹ which gave them a right to enter upon the land; and the verdict was entered accordingly, leave being reserved to move to enter a verdict for the lessor of the plaintiff.

¹ By sect. 137 of stat. 7 & 8 Vict. c. 59, it is enacted, "that, subject to the provisions of this act, it shall be lawful for the company to agree with the owners of the lands, which they are hereby authorized to enter into and take for the purposes of the railway, for the absolute purchase for a consideration in money of any such lands, or such parts thereof, as they shall think proper, and of all subsisting leases therein."

By sect. 158 it is enacted, "that the company shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this act, until they shall either have paid to every party having an interest in such lands, or deposited in the Bank of England in the

Doe d. Hudson v. The Leeds and Bradford Railway Company.

Knowles now moved accordingly. Where a vendor agrees to sell to a vendee, and the treaty for the purchase goes off, the vendee is only tenant at will. This transaction was before the passing of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, under which *Doe d. Armistead v. The North Staffordshire Railway Company*, 15 Jur. 944; s. c. 4 Eng. Rep. 216, was decided. In that case, the land of the lessor of the plaintiff was taken *in invitum* by proceedings under sect. 68 of stat. 8 & 9 Vict. c. 18, and the compensation money was deposited in the Bank of England. Here the defendants derive all their power from sect. 158 of stat. 7 & 8 Vict. c. 49.

LORD CAMPBELL, C. J. I am of opinion that the learned judge was quite right in holding that ejectment was not maintainable. Under their special act the defendants had a right, by proceeding in a specified manner, to take possession of the land in question. Instead of pursuing that course, there is a reference to an arbitrator to fix the value of the land, and the compensation to be paid to the lessor of the plaintiff; and in the mean time he consents that the defendants shall take possession, and probably lay out money in constructing their works. Mr. Knowles is driven to contend, that during all this time the defendants are mere tenants at will, and liable to be turned out by demand of possession; but I am clearly of opinion that such is not the interest which they possessed in the land, and, therefore, they are not liable to be made trespassers by a demand of possession. And there is no hardship on the lessor of the plaintiff, because he has under the award of the arbitrator, to whom he agreed to refer the amount of compensation, a remedy for recovering the value of his land as effectual as the lessor of the plaintiff had in *Doe d. Armistead v. The North Staffordshire Railway Company*.

PATTESON, J. Under their special act the defendants cannot enter upon lands, which they have power to take in a compulsory manner, until compensation be made, except by consent of the owner. In this case the consent of the owner was given, and nothing remained but to settle the amount of the compensation; otherwise, if the land owner was not satisfied with the amount awarded to him, he might revoke his consent, and make the company trespassers, which would open a door to the exercise of great oppression on railway companies.

WIGHTMAN and ERLE, JJ., concurred.

Rule refused.

manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein."

By sect. 136 it is enacted, "that, subject to the provisions and restrictions in this act contained, it shall be lawful for the company to make and maintain the said railway and works on the line and upon the lands delineated and described on the plans and in the books of reference hereinafter mentioned, or in the schedule hereto, and for that purpose to enter upon, take, and use such of the lands so delineated and described as shall be necessary for making and constructing the said railway and works."

Sivewright v. Archibald.

the negotiation till the 27th of October, 1849, when the defendant denied his liability.

I left the question to the jury, whether the defendant had ratified the contract sent to him contained in the bought note. The jury found that he had; whereupon a verdict was entered for the plaintiff for 125*l.* damages, with liberty for the defendant to move to enter the verdict for him if the court should be of opinion that there was not evidence to prove the declaration as amended.

Having heard the rule obtained for this purpose learnedly argued, I do not think that there was any sufficient evidence of ratification. Nothing having such a tendency was done by the defendant before the 26th of March, the day on which he ought to have performed the contract, and on which he broke it. What constituted the ratification, and what date is to be given to it? There never was any reference by the defendant to the terms of the bought note more than of the sold note. The variance between them was not known to him till after the action was brought; nor was there ever any assent by the plaintiff to accede to the terms of the bought note, whereby he would have been bound to deliver Dunlop, Wilson, & Co.'s pig iron. The sold note, containing different terms, instead of being discarded by the plaintiff, was actually declared on by him, and was set up by him as the true contract till the declaration was amended.

The plaintiff likewise sought to recover under a contract for goods bargained and sold; but this could not avail him, for the defendant never accepted the goods; and the contract was not for the sale of any specific goods, the property in which could be considered as transferred to him.

Recurring to the special count, the plaintiff attempted to support it by the parol agreement alleged to have been entered into between the broker and the defendant, using the bought note as a memorandum of the agreement to satisfy the Statute of Frauds.

In the first place, there seems a difficulty in setting up any parol agreement where the parties intended that there should be, and understood that there was, a written agreement. What passed between the defendant and the broker previous to the 26th of February seems to me only to amount to an authority from the plaintiff to the broker to enter into the contract; and Miller himself said, "On the 26th of February I *wrote a contract*, and sent it to the defendant. I sent a sold note the same day to the plaintiff." Again: the memorandum, under the 17th section of the Statute of Frauds, must be signed by the party to be charged, or his agent. But assuming that the parol agreement was the contract, and that when Miller wrote the bought note it was only to tell his principal what he had done, there is a difficulty in saying, that being *functus officio* as far as making the bargain was concerned, he had any authority to sign the memorandum as the defendant's agent, and thereby to charge him. But if he had, can this be said to be a true memorandum of the agreement? We are here again met by the objection of the *variance*, which is as strong between the parol agreement and the bought note

Sivewright v. Archibald.

as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note; and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected and the declaration was amended.

I by no means say that, where there are bought and sold notes, they must necessarily be the only evidence of the contract. Circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold, without hesitation, notwithstanding some *dicta* and a supposed ruling of Lord Tenterden in *Thornton v. Meux*, Moo. & M. 43, to the contrary, that this entry is the binding contract between the parties, and that a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, would not affect its validity. Being authorized by the one to sell, and the other to buy, in the terms of the contract, when he has reduced it into writing, and signed it as their common agent, it binds them both, according to the Statute of Frauds, as if both had signed it with their own hands. The duty of the broker requires him to do so, and till recent times this duty was scrupulously performed by every broker. What are called the bought and sold notes were sent by him to his principals, by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them. This clearly appears from the practice still followed of sending the bought note to the buyer and the sold note to the seller; whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; if there be any material variance between them, they are both nullities, and there is no binding contract. This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases, that I could not venture to contravene it if I did not assent to it; but where there is no evidence of the contract unless by the bought and sold notes sent by the broker to the parties, I do not see how there can be a binding contract unless they substantially agree; for contracting parties must consent to the same terms, and where the terms in the two notes differ, there can be no reason why faith should be given to the one more than the other. This is certainly a most inconvenient mode of carrying on commercial transactions; from the carelessness of brokers and their clerks mistakes not unfrequently arise of which unconscientious men take advantage, and no buyer or seller can be safe unless he sees the sold or bought note as well as his own — a precaution which the course of business does not permit to be taken. But these inconveniences can only be remedied by the legislature

Sivewright v. Archibald.

enforcing upon the broker the faithful performance of his duty in entering and signing the contract in his book.

In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with; and I agree with my brother Patteson in thinking that the defendant is entitled to our verdict.

My brother Wightman, who heard the argument, but is now engaged elsewhere in the discharge of a public duty, has authorized me to say, that he has read this judgment, and that he entirely concurs in it.

But the court being divided, instead of making the rule absolute to enter the verdict for the defendant, we think that a nonsuit should be entered, so that the plaintiff may have the opportunity to bring a fresh action, and by a special verdict, or a bill of exceptions, to take the opinion of a court of error on his rights.

Nonsuit entered.

Doe d. Davies v. Davies.

DOE d. DAVIES v. DAVIES.¹

Easter Term, May 2, 1851.

Will, Construction of — Conditional Devise.

A testator, after charging certain fee simple property in L. with an annuity, devised, subject thereto, "that provided my said son J. D. (his heir at law) shall, when requested by my son D. D., effectually convey and assure unto him, the said D. D., his heirs and assigns forever, free from all manner of incumbrances, all that messuage, &c., called C., in the parish of T., &c., then I give and devise all and singular the aforesaid messuages, &c., out of which the said annuity or rent charge is to be issuing as aforesaid unto him, the said J. D., his heirs and assigns forever; but if the said J. D. shall, when required as aforesaid, refuse to execute such a conveyance unto the said D. D. and his heirs, then I give and devise the said messuages, &c., so made liable to the payment of the said annuity, unto my said son D. D., his heirs and assigns forever."

J. D. continued seized of both L. and C. until his death, C. being all the time let by him to a tenant from year to year, and at his death he devised all his property to his wife. D. D. never requested J. D. to convey C. to him; but after his death D. D. tendered a conveyance for execution to J. D.'s wife, which she refused to execute:—

Held, that D. D. could not maintain an action of ejectment for the recovery of the property in L.

THIS was an action of ejectment brought to recover certain premises in the parish of Llanycil, in the county of Merioneth. The declaration contained two demises by David Davies, the first dated the 11th of June, 1848, and the second the 31st of July, 1848.

The cause came on to be tried, at the Summer assizes for the county of Merioneth, 1850, before Talfourd, J., when a verdict was found for the defendant, subject to the opinion of this court on the following case:—

Gabriel Davies being seized in fee simple of certain premises in the parish of Llanycil, in the county of Merioneth, by his last will and testament, bearing date the 30th of July, 1828, after charging the same with an annuity of 50*l.*, payable to his daughter Ann Roberts, devised the same as follows: "And subject to the payment of the said annuity, and all costs and charges attending the recovery thereof, and provided my said son John Davies shall, when requested by my son the Rev. David Davies, and at the expense of the said David Davies, effectually convey and assure unto him, the said David Davies, his heirs and assigns forever, free from all manner of incumbrances, all that messuage, lands, and hereditaments, called by the name of Caryngylliad, situate and being in the parish of Trowsfynydd aforesaid, in the said county of Merioneth, (lately purchased of Wilson Jones, Esq.,) then I give and devise all and singular the aforesaid messuages, tenements, lands, hereditaments, and premises out of which the said annuity or rent charge is to be issuing as aforesaid unto him, the said John Davies, his heirs and assigns forever; but if the said John Davies shall (when required as aforesaid) refuse to execute such a conveyance unto the said David Davies and his heirs, then I give and devise the said messuages, lands, and hereditaments so made

¹ 20 Law J. Rep. (N. S.) Q. B. 406.

Doe d. Davies v. Davies.

liable to the payment of the said annuity, unto my said son David Davies, his heirs and assigns forever."

The said Gabriel Davies died on the 2d of August, 1828, seized of the said Llanycil estate as aforesaid, and at that time the said John Davies was seized in fee of the said Caryngylliad estate. He continued so seized thence up to the time of his death, demising the same to one Ephraim Griffiths, as tenant from year to year, and dealing with the same in every way as his own. Griffiths occupied the said estate as such tenant for twenty years next before the death of the said John Davies. On the death of the said Gabriel Davies, the said John Davies entered into possession of the said Llanycil estates, and continued so possessed up to the time of his death, which took place on the 11th of June, 1848; and by his last will and testament, bearing date the 9th of October, 1840, he devised as follows: "I give, devise, and bequeath all my real and all my personal estate unto my wife Jennett Davies, her heirs, executors, and administrators." Upon the death of the said John Davies, the said Jennett Davies, the defendant, entered into possession of the said Llanycil estate, and also into possession of the Caryngylliad estate, and is now so possessed.

The jury found that the said David Davies, the lessor of the plaintiff, never requested the said John Davies to convey to him the said Caryngylliad estate, but they found that the said David Davies did, on the 29th of July, 1848, tender to the said Jennett Davies a conveyance of the said Caryngylliad estate to him, and that she refused to execute it. The conveyance so found by the jury to have been tendered to the defendant was put in evidence by the plaintiff. After reciting the will of Gabriel Davies, the possession by John Davies of the Llanycil estate, his death, and that the defendant was then in possession of the same, it purported to convey the estate called Caryngylliad to the lessor of the plaintiff in fee simple; and it contained, also, the following covenants on the part of the defendant, her heirs, executors, and administrators: That, notwithstanding any act, deed, matter, or thing by the defendant, or any of her ancestors, made, done, or knowingly permitted or suffered, the defendant had then good power to grant, convey, and release the said premises thereinbefore conveyed, or expressed and intended so to be, unto and to the use of the plaintiff, his heirs and assigns, free from incumbrances; and that the defendant and her heirs, and all other persons lawfully or equitably claiming through or in trust for her, or any of her ancestors, would at all times, at the cost of the plaintiff and his heirs, make, do, acknowledge, and execute all such acts, deeds, conveyances, and assurances for the further and better conveying and assuring all the premises thereinbefore conveyed, or expressed and intended so to be, unto and to the uses of the said plaintiff, his heirs and assigns, as by him or them should be reasonably required.

The wills of the said Gabriel Davies and John Davies, and the said conveyance so tendered for execution to the defendant, are to form part of this case, and may be referred to by either party.

The question for the opinion of the court is, whether, upon the

Doe d. Davies v. Davies.

construction of the will of the said Gabriel Davies, and under the circumstances hereinbefore stated, the said David Davies, the lessor of the plaintiff, was, at the date of either of the demises hereinbefore stated, seized of such an estate in the said Llanycil estates as to entitle the plaintiff to recover in this action.

If this court should be of opinion that he is, then the verdict found herein is to be set aside, and, instead thereof, a verdict is to be entered for the plaintiff. But if this court should be of a contrary opinion, then the verdict herein is to stand.

Shapter, (Beavan with him,) for the lessor of the plaintiff. The court will not construe strictly as conditions what may be considered as conditional limitations. *Phipps v. Ackers*, 9 Cl. & F. 583, and *Bromfield v. Crowder*, 1 N. R. 313. The whole will must be looked to, and here the intention clearly was to give a determinable fee to David Davies, with a conditional limitation over to John Davies. It was meant that David should have the estate in all other events than the one relating to John. *Fearne on Contingent Remainders*, 233, 247; *Luxford v. Cheeke*, Lev. 125; and *Bradford v. Foley*, Dougl. 63. [Lord Campbell, C. J. That would amount to an absolute disinheriting of the heir at law, and the testator's object clearly was to give him an option.]

The primary intention was to keep the two estates separate, and that John should not have the second, except only on a certain specified event which has not happened, and where the primary ruling intention is evident, the will ought so to be construed as to give it effect. *Smart v. Clarke*, 3 Russ. 365; s. c. 5 Law J. Rep. Chanc. 111. Secondly, David has the whole period of his life to make a tender of a conveyance, and the case finds that he did make a tender to the representatives of John, and, therefore, he is entitled to recover upon the demise laid. "Incumbrances" must mean those created by John or his devisees. *Fazakerley v. Ford*, 1 Ad. & E. 897; s. c. 2 Law J. Rep. (N. S.) K. B. 111. Thirdly, John had dispensed with the necessity for a tender of the conveyance. He had disqualified himself from executing such conveyance by demising the estate, as the case finds that he did. "If a feoffment be made upon condition to enfeoff another, &c., if the feoffee before the performance of the condition enfeoff a stranger, or make a lease for life, then may the feoffor and his heirs enter, &c., because he hath disabled himself to perform the condition, inasmuch as he hath made an estate to another," &c. Lit. sec. 355; and Coke, commenting upon that, (Co. Lit. 221, a,) says, "And to speak once for all, the feoffee is disabled when he cannot convey the land over according to the condition, in the same plight, quality, and freedom as the land was conveyed to him." To the same effect is Com. Dig. "Condition," (M.) 4, and Shep. Touch.

[Lord Campbell, C. J. A tenancy from year to year can hardly be called an incumbrance within the meaning and intention of the testator. Both Littleton and Coke speak of a feoffment.]

There is no distinction between deeds and wills in this respect. The intention is to be ascertained in the same manner. This was so

Doe d. Davies v. Davies.

considered by Lord Brougham in *Cole v. Sewell*, 2 House of Lords Cases, 186.

[*Erle*, J., referred to Co. Lit. sec. 357.]

If it be possible to construe this as a conditional limitation, the court ought so to decide. *Doe d. Taylor v. Crisp*, 8 Ad. & E. 779; s. c. 8 Law J. Rep. (n. s.) Q. B. 41. He referred, also, to *Cockerell v. Cholmeley*, 10 B. & C. 564; s. c. *nomine Cholmeley v. Paxton*, 8 Law J. Rep. K. B. 197.

Welsby (*Foulks* with him) was not heard.

LORD CAMPBELL, C. J. I am of opinion that the lessor of the plaintiff cannot recover under either of the demises. First, it is argued that, at the death of Gabriel Davies, the estate vested instantly in David. That would be contrary to the intention of the testator, for he intended that John should have the estate if he thought fit; and to construe the will in that way would be not only to deprive John of the option which it was intended he should have, but also to disinherit the heir at law, which clearly the testator never intended. Then, as to the refusal by the devisee of John to execute the conveyance tendered, it is upon a refusal by John himself that the estate is to vest in David, and it cannot be said that a refusal by his devisee is a refusal by John. Next, it is argued, that John had disqualified himself from conveying, and, therefore, that a tender of a conveyance to him became unnecessary. No doubt, if he had disqualified himself, the tender would be unnecessary; but how can that be said merely because the estate was under a demise from year to year after the testator's death, as very likely it was before? What Coke states in the passage cited, no doubt, is good law; but he is speaking only of a feoffment upon condition, and that cannot apply to the case of a will. I cannot accede to the doctrine that there is no distinction between the construing of deeds and wills. In the case of a will, the court looks not to the technical meaning of the precise words, but to the sense in which they are used by the testator. Here, the testator expresses that the estate is to be conveyed "forever, free from all manner of incumbrances," and it cannot be said that would not have been complied with if John had conveyed subject to the tenancy from year to year. Besides, he might at any time have obtained a surrender of the tenancy. It seems to me, therefore, that John never did disqualify himself to convey, and that, upon the whole, the action cannot be maintained.

PATTESON, J., concurred.

WIGHTMAN, J. The construction contended for, namely, that David became seized of the estate immediately upon the testator's death, would deprive John of the option intended to be given him, and be altogether contrary to the testator's intention. But it is said that John had put it out of his power to convey "free from all manner of incumbrances," and, therefore, that the estate became vested in

Collett v. The London and North-western Railway Company.

David. It seems to me, construing the will according to the intention of the testator, these words cannot be considered as being applicable to a tenancy from year to year, which might at any time be surrendered.

ERLE, J. I am of the same opinion. The estate vested in John, as heir at law, until a certain condition was performed by him; and that condition has not been got rid of, nor has John done what would be equivalent, namely, rendered himself incompetent to convey the estate. I think, according to the fair meaning of the words used, John would have been entitled to a reasonable time, after the tender of a conveyance, to have given notice to put an end to the tenancy from year to year, or to have paid off a mortgage, and so to have conveyed free from all manner of incumbrances.

Judgment for the defendant.

COLLETT V. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.¹

Easter Term, May 6, 1851.

Railway Company, Liability of — Carriage of Mails and Officers of Post Office — Duty of Company — 1 & 2 Vict. c. 98 — Personal Injury to Officer.

A declaration in case alleged that the mails from L. to T. were carried on the defendants' railway, pursuant to the provisions of the 1 & 2 Vict. c. 98. That the plaintiff was an officer of the post office whom the defendants had been reasonably required by the post-master general to take up and carry, and had taken up and were carrying as such officer, in and upon a carriage of the defendants, in which the said mails were being conveyed. That the plaintiff, as such officer, then was lawfully in and upon the said carriage, and that thereupon it became and was the duty of the defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff. Breach, that the defendants omitted and neglected to use due and proper care and skill, and so negligently and unskilfully conducted themselves in and about carrying and conveying the plaintiff, and in conducting, managing, and directing the said carriage and the engine and other carriages, and the railway itself, that the said carriage sustained a violent concussion, and the plaintiff was thereby greatly injured and prevented from attending to his business, &c., (alleging special damage:—)

Held, upon demurrer, that a duty as alleged arose out of the obligation imposed upon the defendants by the 1 & 2 Vict. c. 98, and that the action was maintainable.

CASE. The declaration alleged that the defendants, before and at the time of the committing of the grievance hereinafter mentioned, were the owners and proprietors of a certain railway, to wit, the London and North-western Railway, and of certain carriages and locomotive engines used by them for the carriage and conveyance of passengers, goods, and chattels upon and along the said railway, from a certain place, to wit, London, to divers other places, among

¹ 20 Law J. Rep. (n. s.) Q. B. 411.
26 *

Collett v. The London and North-western Railway Company.

such places a certain place, to wit, Tamworth, and from the places aforesaid to London aforesaid, for hire and reward to them the said company in that behalf. That certain mails or post-letter bags, to wit, the mails or post-letter bags from London to Tamworth, among others, had been required to be and were carried by the defendants in and on the said railway, pursuant to the provisions of a certain act of Parliament, made and passed at a session of Parliament holden in the first and second years of the reign of the now queen, entitled "An Act to provide for the conveyance of the mails by railways." That the plaintiff was an officer of the post office, whom the postmaster general had reasonably required of the defendants that they should take up, carry, and convey in and upon the carriage conveying the said mails or post-letter bags, and the defendants had then taken up, and were then carrying and conveying, the plaintiff as such officer, in and upon a carriage on the said railway, to wit, a carriage of them, the defendants, on the said railway, in which carriage the said post-letter bags then were, and the plaintiff then being such officer, and as such officer then was lawfully in and on the said last-mentioned carriage as such officer, and thereupon it became and was the duty of the said company, the defendants, to use due and proper care and skill in and about the carrying and conveying the plaintiff. Yet the defendants not regarding their said duty in that behalf, heretofore, to wit, on the day and year aforesaid, did not use due and proper care or skill in and about the carrying and conveying the plaintiff, but omitted and neglected so to do, and then took so little and such bad care, and so negligently and unskillfully conducted themselves in and about the carrying and conveying the plaintiff in his said journey, and in conducting, managing, and directing the carriage in which the plaintiff then was as aforesaid, and the engine to which the same was then attached, and certain other carriages of the defendants then on the said railway, and the said railway itself, that by means of the premises, and by and through the mere carelessness, negligence, and improper conduct of the defendants in that behalf, the said engine, which was then drawing the said carriage in which the plaintiff was such passenger as aforesaid, was then run and driven with great force and violence upon and against a certain other train of the defendants then being negligently, carelessly, and improperly on and upon the said railway, in the way of the said first-mentioned engine, and thereby the said carriage, in which the plaintiff then was such passenger as aforesaid, received and sustained a sudden and violent concussion; and the plaintiff thereby became and was thrown and cast with great violence upon and against divers parts of the said last-mentioned carriage and the fittings up thereof, whereby the plaintiff not only became and was greatly hurt, bruised, wounded, and injured, and became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the plaintiff thereby suffered and endured great pain, and was hindered and prevented from attending to his said occupation of a post-office officer or clerk, in so ample and beneficial a manner as he was before then

Collett v. The London and North-western Railway Company.

used and accustomed to do, and thereby lost and was deprived of divers great gains and emoluments, to wit, to the amount of 200*l.*, which he otherwise might and would have acquired. And also by means of the premises the plaintiff's health and constitution had been and were greatly and permanently injured, weakened, and impaired, insomuch that he, the plaintiff, will hereafter be unable to work at or follow his said occupation or employment in the same beneficial and lucrative manner as before then he was used and accustomed to do, and otherwise might and would have done, and has continued and will continue so sick and unable to work that he will lose and be discharged from his said situation of post-office clerk, and lose the salary and emolument thereof. And also by means of the premises the plaintiff has been obliged to, and hath necessarily expended, and become liable to pay, divers sums of money, in the whole amounting to a large sum of money, to wit, to the sum of 150*l.*, in and about endeavoring to be cured of the said injuries aforesaid, occasioned as aforesaid, to the plaintiff's damage, &c.

Demurrer, for that the declaration did not disclose sufficient to show that any duty as respects carriage existed between the plaintiff and the company, or that, if any such duty existed, that there had been a violation of it.

The plaintiff's point for argument was, that he was lawfully upon one of the company's carriages, with their leave, for the purpose of being safely and securely carried, and that any statement as to how or why he was there was not necessary.

Cowling, for the defendants. The substantial question is, the extent of the liability of the company; and, first, there is no liability in respect of the carriage of the officers who travel with the mail bags, and who are, in truth, the servants of the postmaster general. The 1 & 2 Vict. c. 98, s. 1, requires the company to provide carriages for the conveyance of the mails, and the guards and any other officers appointed and employed by the postmaster general in charge thereof, to the satisfaction of the postmaster general, and at such times, and subject to such other reasonable regulations and restrictions, as he shall direct. Then, by the 6th section, the company are to be remunerated for such carriage by the postmaster general, and by the 7th section the services of the company may at any time be determined by the postmaster general, by giving six months' notice thereof to the company. These and other sections of the act show that there is no contract between the company and a person in the situation of the plaintiff. The contract is with the postmaster general, and the plaintiff's remedy, if any, is against him.

[*Lord Campbell*, C. J. The question is, What is the duty of the company? Is it not to carry safely and securely, if they carry at all?]

The case of *Boorman v. Brown*, 3 Q. B. Rep. 511, establishes that the duty results from a contract, and here the implied contract is with the postmaster general. In all such cases, the question must turn upon the meaning of the particular act; and where, as here, the

Collett v. The London and North-western Railway Company.

postmaster general is to employ the servants in charge of the mails, there is no duty imposed, except on the postmaster general.

[*Erle, J.* In *Levy v. Langridge*, 4 Mee. & W. 337; s. c. 7 Law J. Rep. (N. s.) Exch. 387, the defendant was held liable for damage occasioned by the bursting of a gun falsely warranted to be sound, whilst in the possession of a person to whom the defendant's representation was indirectly made, and for whose use he knew that the gun was purchased. Here the postmaster general contracts with the company to carry the letters and the officers in charge, and one of the officers is injured; does not that come within the contract?]

Levy v. Langridge was considered in the late case of *Howard v. Shepherd*, 19 Law J. Rep. (N. s.) C. P. 249, where it is said that the decision rested on the ground of fraud. There is no allegation here that the company acted contrary to the directions of the postmaster general, or negligently as respects such directions, nor is it averred that the carriage or the letters were in any way injured. If the contract is not confined to the postmaster general, the owner of each letter might bring an action against the company. There is no limit to the number of officers to be sent in charge of the mails, and as they are constantly moving about in the carriage, the risk on the company would be much greater than in the case of ordinary passengers. The carriage, too, is to be according to the directions of the postmaster general, and it may be very suitable for letters, but not for the conveyance of the officers.

Bramwell, contra, was not heard.

LORD CAMPBELL, C. J. There is, I think, no doubt at all in this case. The allegation in the declaration, that it was the duty of the defendants "to use due and proper care and skill in and about the carrying and conveying of the plaintiff," is made out in point of law. That duty does not arise from any contract with the plaintiff, but from the obligation imposed by the legislature upon the company to carry the mail bags and the officers of the post office in charge of the letters; and if it be the duty of the company to carry the plaintiff at all, it must be their duty, in doing so, to use reasonable care and skill. It cannot be said that it is enough for the company to bring the dead body to the end of the journey. It is their duty to take care that reasonable care and skill is used; and here a breach of that duty is alleged, and the plaintiff is entitled to maintain an action for the injury he has thereby sustained.

PATTESON, J. This is not a matter of contract, but a duty cast upon the company by an act of Parliament. The only matter of contract that I can discover in the act is under the 6th section, as to the remuneration to be paid to the company. The declaration alleges expressly that the plaintiff and the mails were actually received, and were being carried and conveyed in a carriage of the defendants, and that the plaintiff was lawfully in and upon the said carriage. There is no contract in the case at all, but an obligation is cast upon

The Master Warden, &c., of the Company of Tobacco-pipe Makers v. Loder.

the company to carry, and the duty arising out of that is to carry safely and securely, a breach of which is alleged here. It would be extraordinary if the postmaster general were the person to sue for a personal injury to one of the officers.

WIGHTMAN, J. I am of the same opinion. The duty alleged arises not from any contract, but from the obligation cast upon the company by the act of Parliament.

ERLE, J. The defendants have cast upon them the public duty of carrying persons in the situation of public servants, and they have been guilty of a breach of that duty, which has resulted in special damage to the plaintiff. This, therefore, is the common form of an action on the case for the non-performance of a public duty.

Judgment for the plaintiff.

THE MASTER WARDEN, ASSISTANTS, AND FELLOWSHIP OF THE
COMPANY OF TOBACCO-PIPE MAKERS v. LODER.¹

Easter Term, May 2, 1851.

*Limitations, Statute of — 21 Jac. 1, c. 16, s. 3 — Debt for Penalty
under a By-law.*

An action of debt for a penalty due under a by-law made by virtue of a charter is "an action of debt grounded upon a contract without specialty," and is barred by 21 Jac. 1, c. 16, s. 3, if not commenced within six years after the penalty becomes due.

DEBT. The declaration recited a charter of 15 Car. 2, incorporating the plaintiffs by the name of "The Master Warden, Assistants, and Fellowship of the Company of Tobacco-pipe Makers," and empowering them so often as it should seem needful and expedient to assemble, convocate, and congregate themselves together, and from time to time to ordain and make any constitutions, statutes, laws, ordinances, articles, and orders whatsoever which should seem requisite for the good estate, rule, and government of the said society, and all and singular such pains, penalties, and punishments by fine and amerciamment against or upon any offender which should break or violate the said constitutions, laws, &c., to provide, impose, and limit, and the same and every parcel, &c., to ask, levy, take and receive, by way of distress, or otherwise by any other lawful ways or means, of or against the offender or offenders, his or their goods or chattels, or any of them, as the case should require, &c.

The declaration then averred the making of certain by-laws, according to the powers of the said charter, whereby it was ordered (amongst other orders and ordinances then made) that every freeman or brother of the said company should pay yearly, by the name of

¹ 20 Law J. Rep. (n. s.) Q. B. 414.

The Master Warden, &c., of the Company of Tobacco-pipe Makers v. Loder.

quarterage money, to the master and wardens of the said company, the sum of 8s., which should be paid quarterly at certain quarterly meetings, and that every person refusing or neglecting to pay his quarterage within the space of ten days after any of the said quarterly meetings, should forfeit and pay twice so much as should be at any time in arrear and not paid; that the defendant became and was a freeman of the said company, and by virtue of the said ordinance became liable to pay to the said company the said quarterage, but that he neglected to pay several quarterages, amounting to 8*l.* 10s., within the space of ten days after the quarterly meetings, whereby he forfeited to the plaintiffs 17*l.*, being twice the sum so in arrear and not paid, whereby an action has accrued, &c.

Plea, as to 12*l.* 4s., parcel of the sum of 17*l.*, being the sum which the defendant forfeited and became liable to pay to the plaintiffs by reason of the non-payment of the said quarterage, which became due and payable on and previous to the 9th of January, 1844, that this is an action of debt grounded upon a contract without specialty, and that the causes of action in the introductory part of this plea mentioned did not, nor did any or either of them, accrue to the plaintiffs at any time within six years next before the commencement of this suit.

Demurrer, on the ground that the Statute of Limitations referred to by the plea is not pleadable to the cause of action declared upon. Joinder in demurrer.

J. Addison, in support of the demurrer.¹ This plea is bad. The 21 Jac. 1, c. 16, s. 2, will be relied on, as it will be said that this is an "action of debt grounded upon a lending or contract without specialty." But this claim is for a penalty due under a by-law made by virtue of the charter, and the title to the penalty is derived from the charter, which is a record. The by-law is not the authority for imposing the penalty. It is like the case of an execution of a power which derives its effect under the deed, and not from the donee of the power. Suppose the charter had not prescribed any remedy by action of debt, it could not be contended that *assumpsit* would lie for this penalty, which would be the case if it were due not upon specialty. There is no authority to be found that such an action is within that clause of the statute; and by analogy to debt for not setting out tithes, or for arrearages of rent, or for an escape, (Bac. Abr. "Limitation of Actions," D, 3,) it cannot be now held to be so.

Udall, contra. The contract of the defendant does not arise from the charter, but it exists by reason of his having become a member of the corporation, and thereby impliedly agreeing to observe all the ordinances. A by-law may be enforced by debt on simple contract. 5 Wentworth, 168. It was expressly decided that *assumpsit* would lie upon a by-law in *The Barber Surgeons v. Pelson*, 2 Lev. 252, where *The Mayor, &c., of London v. Gorry*, 2 Lev. 174, was acted

¹ Feb. 14 and 15, before PATTESON, COLERIDGE, WIGHTMAN, and ERLE, JJ.

The Master Warden, &c., of the Company of Tobacco-pipe Makers v. Loder.

upon. These were cases referred to in *The Feltmakers Company v. Davis*, 1 Bos. & P. 98.

[*Wightman, J.* The fact of *assumpsit* lying is not conclusive, for the statute of James does not apply to debt on an award under a parol submission, where, however, *assumpsit* would lie.]

If the statute of James does not apply, there is no limitation to such an action, for the 3 & 4 Will. 4, c. 42, s. 3, which provides for actions founded upon specialties, does not extend to such a case as the present.

Addison, in reply. *The Barber Surgeons v. Pelson* is no authority for the general proposition that *assumpsit* will lie upon a by-law. It must be taken that there was in that case an express promise. There may be a duty imposed on the freeman to pay the quarterage from which an implied promise to pay it might arise, but the charter alone is the title to the penalty, which is what is here sued for. The same observation applies to *The Mayor, &c., of London v. Gorry*, which is more fully reported in 1 Ventris, 298. The argument drawn from the omission of such an action as the present, in the 3 & 4 Will. 4, c. 42, s. 3, is wholly untenable.

Cur. adv. vult.

The judgment of the court was now delivered by

LORD CAMPBELL, C. J. The question raised by the demurrer to the plea is, whether the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, barring all actions of debt grounded on any lending or contract without specialty after six years, applies to an action of debt for a penalty due under a by-law. For the plaintiffs, it was contended that the action is grounded on the by-law, and inasmuch as the by-law derives its validity from the charter under which it is made, and as the charter is under the great seal and of record, the action of debt grounded thereon is not grounded on a contract without specialty, and so not barred by the above-mentioned statute.

For the defendant, it was argued that the liability in question was grounded on the consent to become a member of the company, so as to incur all the liability imposed upon its members; that such consent was, in effect, a contract without specialty, and so the action thereon would be barred in six years after the cause of action was complete. This argument was supported by several cases. In *The Mayor, &c., of London v. Gorry*, it was held, that *assumpsit* could be maintained for money due for scavage by custom, although the jury found that there was no express promise. In *The Barber Surgeons v. Pelson*, it was held, that *indebitatus assumpsit* lay for money forfeited to the company under a by-law. This case is in point for the defendant, unless it is distinguished upon the supposition that, upon demurrer to the declaration, an express promise was to be assumed; but inasmuch as the judgment is stated to be founded on *The Mayor, &c., of London v. Gorry*, in which the jury found there was no express promise, it seems to us that the opinion of the court rested upon the nature of the liability, and not on the supposition of an express promise. In

The Sunderland Marine Insurance Company v. Kearney & another.

The Feltmakers Company v. Davis, Eyre, C. J., says, that the claim to a penalty under a by-law arises upon something in the nature of a specialty, but he does not affirm that it is grounded upon a specialty, and the passages that follow indicate that *assumpsit* might, in his judgment, be maintained. In *The London Tobacco-pipe Makers Company v. Woodroffe*, 7 B. & C. 838, the objection that the charter was inadequate to bind all the tobacco-pipe makers of the kingdom was overruled, upon the ground that it was binding upon the defendant by reason of his having consented to become a member of the company. The court thereby recognized the principle that the liability under the by-law is founded upon consent, which is in the nature of a simple contract.

It was further contended, for the defendant, that the legislature considered the claim to money forfeited under a by-law to be barred by the 21 James, c. 6, s. 3, because when the 3 & 4 Will. 4, c. 42, was passed, creating a limitation to various causes of action omitted from the former statute, the present cause of action would have been included therein if the former statute had not been considered to have comprised it, it being unreasonable to suppose that an indefinite liability without limitation was intended to be left in respect of the cause of action now in question.

Upon considering these reasons and authorities, we have come to the conclusion that the defendant is entitled to our judgment on this plea. The objections to the declaration were, in our opinion, answered; but as we think the plea valid, it is unnecessary to discuss them in detail.

Judgment for the defendant.

THE SUNDERLAND MARINE INSURANCE COMPANY v. KEARNEY & another.¹

Easter Term, May 2, 1851.

Policy of Insurance — Deed Poll — Absolute Covenant — Liability of incorporated Company — Averment of sufficient Funds — Action of Debt — Joinder of Plaintiffs.

Debt to recover 300*l.* as for a total loss under a deed poll or policy of insurance, sealed with the common seal of the company, (the plaintiffs in error.) The declaration set out the policy, which, after reciting that the said M. Kearney had represented that he was interested in, or duly authorized, as owner, agent, or otherwise, to make the insurance therein-after mentioned with the said company, and had covenanted to pay a certain premium, stipulated, amongst other things, that it was agreed by, and on behalf of, the company, that the capital stock and funds of the said company should, according to the provisions of the deed of settlement of the said company, be subject and liable to make good, and should be applied to pay and make good, all such losses and damages as might happen to the subject matter of the said policy, in respect of the sum of 300*l.* insured, which insurance was thereby declared to be upon cargo, goods, or freight (valued at interest) of and in the good ship *Mary*, whereof Noonan (the other defendant in error) was master; that the

¹ 20 Law J. Rep. (n. s.) Q. B. 417.

The Sunderland Marine Insurance Company v. Kearney & another.

capital stock and funds of the company should alone be liable, according to the deed of settlement, to make good all claims and demands whatsoever under or by virtue of the said policy, and that no shareholder of the company should be in any wise liable to any claims or demands, nor be charged by reason of the said policy beyond the amount of his shares in the capital stock of the company. It was then averred that the defendants, (the plaintiffs in error,) became insurers for 300*l.* upon the freight of the said vessel; that divers goods had been shipped on board the said vessel to be carried for freight, and that from thence until the happening of the loss the plaintiffs (the defendants in error) were interested in the freight of the goods so shipped.

Held, first, that there was an absolute covenant on the part of the company to pay the sum insured when a loss should happen, and that it was not necessary to aver in the declaration that the capital stock and funds were sufficient according to the deed of settlement; the want of funds being a matter to be pleaded, on the part of the company, if a defence at all.

Secondly, that an action of debt was maintainable.

Thirdly, that Noonan was sufficiently designated in the deed poll as a party interested with whom the company contracted, to entitle him to join as a plaintiff in the action.

ERROR from the Common Pleas of the County Palatine of Durham, in an action of debt.

The declaration alleged that, on the 12th of January, 1849, by a certain deed poll or policy of insurance then made by the said company, and sealed with the common seal of the said company, and which said deed poll or policy of insurance, sealed with the said common seal of the said company, the plaintiffs now bring here into court, the date whereof is the day and year aforesaid, after reciting that the said Matthew Kearney had represented to the said company that he was interested in or duly authorized, as owner, agent, or otherwise, to make the insurance thereafter mentioned and described with the said company, and had covenanted or otherwise obliged himself to pay forthwith, for the use of the said company, at the office of the said company, the sum of 12*l.* 12*s.*, as a premium or consideration at and after the rate of four guineas per cent. for such assurance, it was witnessed and was thereby agreed and declared, by and on the behalf of the said company, that in consideration of the sum of 12*l.* 12*s.*, the capital stock and funds of the said company should, according to the provisions of the deed of settlement of the said company, be subject and liable to make good, and should be applied to pay and make good, all such losses and damages thereafter expressed, as might happen to the subject matter of the said policy in respect of the sum of 300*l.* insured, which insurance was thereby declared to be upon cargo, goods, or freight (valued at interest) of and in the good ship or vessel called the *Mary*, whereof Noonan was then master, &c. The rest of the policy was set out, and, amongst other stipulations, a proviso that the capital stock and funds of the said company should alone be liable, according to the provisions of the said deed of settlement, to answer and make good all claims and demands whatsoever under or by virtue of the said policy; and that no shareholder of the said company, his or her heirs, executors or administrators, should be in any wise subject or liable to any claims or demands, nor be in any wise charged by reason of the said policy or the whole of the policies taken together, which have been or may be granted by, or on behalf of, the said company, beyond the amount of his or her shares in the capital stock of the

The Sunderland Marine Insurance Company v. Kearney & another.

said company, it being one of the original and fundamental principles of the said company that the responsibility of the individual proprietors should, in all cases, be limited to their respective shares in the capital stock. The declaration then alleged that thereupon the defendants became insurers to the plaintiffs for the said sum of 300*l.* upon the freight of the said ship or vessel in the said deed or policy of insurance mentioned. That heretofore, to wit, on the 16th of December, 1848, divers goods of great value had been, and were, shipped and loaded, to wit, at, &c., in and on board of the said ship or vessel in the said policy of insurance mentioned, to be carried and conveyed therein, on and for freight in, and during the said voyage; and that they, the plaintiffs, were therefrom thence, until and at the time of the loss hereinafter mentioned, interested in the freight of the said goods so shipped and loaded as aforesaid, to a large value and amount, to wit, to, &c. The declaration further alleged, that during the continuance of the risk in the said deed poll or policy of assurance mentioned, the said ship, by stormy and tempestuous weather, and by the violence of the waves and seas, was so damaged and disabled that by means thereof it became, and was expedient and necessary, for the said ship to sail and proceed to the nearest port, and that afterwards, and whilst the said ship was endeavoring to proceed and sail to the said port, the said ship, with the said goods, were then, by the perils and dangers of the seas, wholly lost to the plaintiffs, and the plaintiffs thereby then also lost, and were deprived of, the freight of the said goods loaded in and on board the said ship, on freight as aforesaid; of all which said premises the defendants afterwards, to wit, on the day and year last aforesaid, had notice. And that by reason thereof, and in consequence of their refusal to pay the 300*l.* assured as aforesaid, an action hath accrued to the plaintiffs to demand, and have of and from the defendants, the said sum of 300*l.* so insured as aforesaid, yet, &c.

The declaration also contained a count for money had and received, and on an account stated.

The defendants pleaded several pleas, upon each of which issue was joined.

At the Spring assizes for the county of Durham, a verdict was found for the plaintiffs, and on the 2d of July following final judgment was thereupon signed.

The material points of the plaintiffs in error were, that the first count of the declaration did not disclose any cause of action, being founded upon a conditional covenant to indemnify out of the capital stock and funds of the company, according to the provisions of the deed of settlement, without showing that the company had any capital stock or funds out of which they could have paid, or what the provisions of the deed were. That debt was not the proper form of action, the covenant being conditional. That the contract appeared to be one under seal with the plaintiff Kearney only, without naming the other plaintiff, who was not shown to have any insurable interest when the policy was effected, or to be jointly interested with Kearney, and, therefore, the action in their names could not be maintained.

The Sunderland Marine Insurance Company v. Kearney & another.

The defendants' points were, that debt was maintainable, the instrument declared on being a deed poll, and the amount sought to be recovered being due under a valued policy after a total loss. That, as the corporation itself was sued, there was no necessity to allege the existence of funds as a condition precedent to the right to recover. And that all defects, if any, of this nature were cured by verdict.

Manisty, (April 25,) for the plaintiffs in error. First, as to whether the action will lie. This is a conditional contract of indemnity, and to be treated as if the action were against the individuals constituting the company. It is a covenant to indemnify out of the capital stock and funds of the company, and according to the provisions of the deed of settlement, and there could be no right of action without averring a default in that respect. The cases on this subject were considered in *Dowdall v. Hallett*, 19 Law J. Rep. (N. S.) Q. B. 37, and in that case there was an express averment that sufficient capital stock and funds of the company existed.

[*Lord Campbell*, C. J. The object seems to be that there shall be no liability beyond the amount of the capital subscribed for; and as the action is against the corporation, that will be so.]

But the declaration, which alleges no more than the existence of the indenture and a loss, does not show a cause of action. It ought to have averred the existence of funds. *Gurney v. Rawlins*, 2 Mee. & W. 87; s. c. 6 Law J. Rep. (N. S.) Exch. 7. *Dawson v. Wrench*, 3 Exch. Rep. 359; s. c. 18 Law J. Rep. (N. S.) Exch. 229. It is only as regards the funds of the company that there is any liability. *Hallett v. The Merchant Traders' Ship Loan and Insurance Association*, 19 Law J. Rep. (N. S.) Q. B. 59; and *Hassell v. The Merchant Traders' Ship Loan and Insurance Association*, 4 Exch. Rep. 525; s. c. 19 Law J. Rep. (N. S.) Exch. 183. Being, then, a conditional contract, an action of debt does not lie without an averment of the performance of the condition. *Randall v. Rigby*, 4 Mee. & W. 130; s. c. 7 Law J. Rep. (N. S.) Exch. 240. The averment of total loss is consistent with a recovery for a partial loss only, and, therefore, the sum is not liquidated.

[*Erle*, J. We must now assume that which will support the count, and here there is a verdict for a total loss.]

Then, as to the joinder of the plaintiffs in the action. The legal interest and the right to sue on a contract of this kind are in the party named in the deed. 1 Roll. Abr. 517, pl. 40, and *Green v. Horne*, 1 Salk. 197. The plaintiff Kearney, therefore, ought at once to have sued.

[*Lord Campbell*, C. J. May it not be enough that the other plaintiff is referred to, although not named as a party? The question is, With whom was the contract made?]

Kearney was the only party who made the contract, and another cannot properly be joined on the ground of interest.

Seymour, (*W. H. Watson* with him,) contra. As to this being a conditional contract, the declaration may be read so as to support it.

The Sunderland Marine Insurance Company v. Kearney & another.

The statement in the policy as to the funds of the company points merely to the fact that the funds were to be the resource from which payment would be made, and has no reference to any particular mode of application. Reasonably construed, the declaration all through impliedly alleges the existence of funds. In *Reid v. Allan*, 4 Exch. Rep. 326; s. c. 19 Law J. Rep. (n. s.) Exch. 39, a policy like the present was held to be binding upon an individual proprietor to the extent of his shares in the capital stock. This is an action against the corporation, and they can only be liable to pay out of the capital stock and funds. In *Milward v. Hibbert*, 3 Q. B. Rep. 120; s. c. 11 Law J. Rep. (n. s.) Q. B. 137, there was no express averment of the existence of funds, and that was an action of debt. *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 5 Com. B. Rep. 440; s. c. 17 Law J. Rep. (n. s.) C. P. 166, is another strong authority showing that this is an absolute, and not a conditional, contract. Then, as to the parties to the action; the contract is to pay to the plaintiffs.

[*Lord Campbell*, C. J. What are the words you rely upon as including the other plaintiff?]

There is, first, the allegation that Kearney was "duly authorized as owner, agent, or otherwise to make the insurance," and afterwards it is alleged that "thereupon the defendants became insurers to the plaintiffs."

[*Lord Campbell*, C. J. This is an instrument under seal, and we must look to the face of the policy to see with whom the contract is made.]

It may now be assumed that the other plaintiff was interested, and that the contract was made with Kearney as owner, and also as agent for the others interested; and if so, upon the face of the declaration, the plaintiffs appear to have been properly joined.

Manisty, in reply. In *Pilbrow v. Pilbrow's Atmospheric Railway Company*, there was no clause showing that events might occur upon which there would be no available funds, and no condition precedent appeared there. In *Milward v. Hibbert*, the clause was not the same as here, and the point was not taken. General averments in the declaration are of no avail, unless the instrument declared upon supports them. *Jowett v. Spencer*, 15 Mee. & W. 662; s. c. 15 Law J. Rep. (n. s.) Exch. 347. *Armitage v. Insole*, 19 Law J. Rep. (n. s.) Q. B. 202. As to the joinder of the plaintiffs, this is a deed poll, and upon such an instrument the only person to sue is the person named as making the contract. He referred to *Abbott on Shipping*, 242.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. We are of opinion that in this case the judgment ought to be affirmed. The counsel for the plaintiffs in

¹ LORD CAMPBELL, C. J., PATTESON, WIGHTMAN, and ERLE, JJ.

The Sunderland Marine Insurance Company v. Kearney & another.

error relied entirely upon objections to the declaration. It will be most convenient to begin with the objection, "That the declaration does not contain any averment that at the time of the loss, or at any time subsequently, the capital stock and funds of the company were sufficient, according to the provisions of the deed of settlement, to satisfy the plaintiffs' claim under the policy." The argument is, that the company only entered into a collateral and conditional covenant to pay the sum insured out of their capital stock and funds, if such capital stock and funds were sufficient for that purpose. But looking to the instrument on which the action is brought, and considering that it is a deed poll under the seal of a corporation, we think that it contains a direct and absolute covenant to pay the sum insured when a loss should happen from the perils insured against. This payment must of necessity be made out of the capital stock and funds of the corporation; and saying "that the capital stock and funds of the company shall be applied to make good the loss to the amount of 300*l.*," is tantamount to a covenant that the corporation will pay the money to the assured — the specified source from which it is to come being merely the expression of that which would have been tacitly understood. Afterwards comes the proviso, "that the capital stock and funds of the company shall alone be liable," and this may be disposed of in the same manner, for the creditor of a corporation can have no remedy except upon the funds or property of the corporation, there being no right under a judgment against the corporation to sue out execution against the individuals who are members of the corporation. This is not to be taken to be a joint-stock company under 7 & 8 Vict. c. 110; and if it were, the stipulation which follows, "that no shareholder shall be liable beyond the amount of his share," would only have the effect of protecting a shareholder against whom there might be an application for leave to take out execution. *Dowdall v. Hallett*, and the other authorities cited upon this question by the counsel for the plaintiffs in error, do not appear to us to have any application to it. But the decision of the Court of Common Pleas, in *Pilbrow v. The Atmospheric Railway Company*, where there was a covenant to pay 15,000*l.* out of the money raised by the first instalments or calls on shares in the company, appears to us to be closely in point; and we adopt the language of my brother Maule: "It is put on the part of the defendants as a condition precedent to their liability that there should be funds in their hands arising from calls or shares sufficient for that purpose. The true sense of the covenant, however, is that it is a simple covenant to pay; it is true that it points out the fund out of which payment shall be made, but it does not make the raising of that fund a condition precedent to the liability of the defendants."

In the present case, if the want of funds would be any defence, we think the want of funds should be pleaded by the defendants. It may be presumed that, having acted honestly, they have funds to enable them to perform their engagements. They only know the state of their funds; and the proviso being introduced by them for their own benefit, they should seek to take advantage of it by plea.

The Sunderland Marine Insurance Company v. Kearney & another.

No such plea being pleaded, we must now assume that they had funds from which payment of the loss might have been made.

These observations dispose of the further objection that *debt* will not lie upon this policy. If instead of being a conditional covenant to do an act, viz., to apply the capital funds of the company, if there were any, to the payment of the loss, it is a positive engagement to pay a certain sum of money upon an event which is averred to have happened, viz., the loss of the subject matter insured, no one can deny that an action of *debt* as well as of *covenant* is maintainable upon it.

The counsel for the plaintiff in error contended that *debt* would not lie, for an additional reason, that the sum to be recovered was not liquidated because it might have turned out that the loss was only *partial*; but a total loss is averred in the declaration, and the verdict is for the full sum of 300*l.*, so that we must now assume that the whole of this sum was due when the action was commenced.

The remaining objection is, that Noonan could not join as a plaintiff, as his name is not mentioned in the policy. It was admitted that he might have joined had the policy not been under seal; but reliance was placed on the rule laid down in *Green v. Horne*, that "though covenant may be brought on a deed poll, yet the party must be named in the deed." But it cannot be meant that his name of baptism and his surname must necessarily be set out. If he be sufficiently designated in the deed, this must be enough to entitle him to sue for breach of covenant to pay money to the person so designated. Kearney is not represented by the policy as the only person with whom the company contract. The introductory words are, that "Kearney had represented to the company that he was interested in or duly authorized as owner, agent, or otherwise to make the assurance." Although he had such authority, there was nothing to prevent the company from entering into a covenant to pay the loss to the persons who were actually interested in the subject matter insured, and on whose account the policy was made. The stat. 23 Geo. 3, c. 56, requires that "no policy shall be effected without inserting therein the name or names of one or more of the persons interested, or of the consignor or consignees of the property to be insured, or of the persons resident in Great Britain who shall receive the order for and effect the policy." This requisition is here complied with by inserting the name of Kearney, but we are to look to the subsequent framing of the policy to see to whom the company covenanted to pay the 300*l.* in case of a loss of the subject matter insured. It seems to us that they covenanted to pay to the persons who were interested in that subject matter and for whom the policy was effected; *certum est quod certum reddi potest*. A designation which cannot be mistaken is, for this purpose, as good as the actual name of the individual. The company engaged to make good all losses and damages which might happen to the subject matter of the said policy in respect of 300*l.* assured. To whom were they to make good? necessarily to the parties interested in the subject matter who were damaged by the loss. These parties were the assured, and accordingly the stipula-

Marson & another v. Lund.

tions of the policy by the company are with the "assured." It contains an express statement that the interest of the assured under the said assurance should be, and was, on freight. The declaration accordingly goes on to aver "that the defendants thereupon became insurers to the plaintiffs for the said sum of 300*l*. upon the freight of the said ship or vessel in the same deed or policy of insurance mentioned." If this be a mere inference of law, there surely are sufficient premises from which this inference may be drawn. There is no reported decision upon the point, because the objection has never before been taken; but the treatises upon marine insurance lay down that the action upon a policy effected by a broker may either be brought in the name of the broker immediately concerned in effecting it, or in the names of the parties interested for whose benefit it was effected, without stating any exception as to policies in the form of a deed poll under the seal of an incorporated company, although a very considerable proportion of English policies, for more than a century, have been by deed poll under the seal of the Royal Exchange Assurance Company or of the London Assurance Company. Upon such policies effected by brokers many actions have been brought in the names of the parties interested, without any objection being made or thought of, respecting the right of the parties interested to sue. The declaration in this case contains an averment which is traversed by the first plea, and found in favor of the plaintiffs, that "the plaintiffs were before and at the time of the loss in the declaration mentioned jointly interested in the freight in the said policy and declaration mentioned, to the amount of the money by them insured or caused to be insured thereon." The plaintiffs, therefore, show that the Sunderland Marine Insurance Company covenanted to pay them the 300*l*. in the event which has happened, and, therefore, that they are entitled jointly to bring this action, although the name of one of them only is mentioned as having effected the policy. For these reasons, we have great satisfaction in overruling the objection made to defeat the action, and in giving judgment for the defendants in error.

Judgment affirmed.

MARSON & another v. LUND.¹

Hilary Term, January 24, 1851.

Scire Facias — Stat. 7 & 8 Vict. c. 110 — Pleading.

Sci. fa., under the 7 & 8 Vict. c. 110, s. 66, against a member of a completely registered joint-stock company, upon a judgment obtained against the company, the plaintiffs having failed, after due diligence, to obtain satisfaction by execution against the property and effects of the company. Pleas, first, that due diligence had not been used, concluding with a verification; secondly, that no rule or order had, before issuing the *sci. fa.*, been obtained of the court or a judge. Replication to the first plea, that due diligence was used, concluding to the country; and to the second plea, a demurrer:—

Marson & another v. Lund.

Held, upon this demurrer, and on demurrer to the replication, —

First, that the writ of *sci. fa.* was a proper remedy, in this case, for, that such writ was, by implication, given by sect. 66 of the 7 & 8 Vict. c. 110, and that the implication was not abrogated by the cumulative remedy given in sect. 68.

Secondly, that the second plea was bad; and, —

Thirdly, that the replication was sufficient, and, under the circumstances, properly concluded to the country.

SCIRE FACIAS. The declaration, after setting out the writ, which recited that a judgment had been recovered by the plaintiffs against the Universal Salvage Company, then and still being a company completely registered and incorporated under the stat. 7 & 8 Vict. c. 110, for 1200*l.* debt and damages, and that such judgment had been entered up on, &c., alleged, that although due diligence had been used by the plaintiffs to obtain satisfaction, &c., against the property and effects of the said company, yet the said plaintiffs had not obtained, and could not obtain, satisfaction of the said judgment by execution against the property and effects of the said company, or otherwise; and that execution, &c., remained to be made to the plaintiffs; and that the present defendant was then a shareholder of the said company. The declaration then proceeded in the usual form, and ended by praying judgment according to the form of the statute, &c.

Pleas — First, that due diligence had not been used by the plaintiffs to obtain satisfaction of the said judgment by execution against the property and effects of the said company, concluding with a verification; secondly, that the plaintiffs ought not to have execution, because the writ of *sci. fa.* was not sued forth or issued by, or in pursuance of, the leave, rule, or order of the court, &c., or of any judge of the said court, &c., according to the form of the statute, &c., &c., concluding with a verification. Replication to the first plea, that due diligence was used, &c., concluding to the country. Demurrer to the second plea, on the ground that no leave, order, &c., was necessary, or, if it were, that the want thereof could not be pleaded as a defence in bar, &c. Demurrer to the replication, for that it ought to have alleged what sort of writ had issued against the property and effects of the company, or that the company had no property, &c., and that it ought to have shown what diligence the plaintiffs had used, and how, and ought to have concluded with a verification. The defendants were also to argue that the writ of *sci. fa.* was bad in law.

Bramwell, for the plaintiffs, argued, that the writ of *sci. fa.* in this case was given by implication from the enactment in sect. 66 of the 7 & 8 Vict. c. 110, and that such implication was not destroyed by the special remedy given in sect. 68 of the same act, for that the special remedy must be taken to be cumulative.

Willes, contra, admitted that, if the 66th section had stood alone, the writ of *sci. fa.* would have been given by implication from its provisions; but contended that the implication was destroyed by the positive enactment contained in sect. 68, and argued that the

Regina v. Haslam & another.

plaintiffs were confined, by the terms of the statute, to the remedy contained in sect. 68. He also contended, that even supposing the declaration to be sufficient, yet the defendant must have judgment on account of the defects in the replication, which, he said, was bad for uncertainty. It ought to have set out the *ca. sa.*, 3 Chit. on Plead. 211, 461. Several issues might be raised on so general an allegation as that due diligence had been observed. It ought to have been shown what was the diligence relied on. Com. Dig., "Pleader," C. 22.

Bramwell having been heard in reply, —

LORD CAMPBELL, C. J. The plaintiffs are entitled to judgment. Looking to the 66th section alone, there is no doubt whatever. The only question can be, whether the implication raised by that section is taken away by sect. 68. I think it is not. It seems to me that the remedy given by sect. 68 is cumulative upon that arising from sect. 66. It gives an additional and more summary remedy than that arising upon sect. 66, and attaches certain checks and cautions to that remedy, if it be the one selected. The second plea has been properly abandoned; it is quite clear that it cannot be sustained; it sets up as a defence a mere irregularity. The replication to the first plea is sufficient. The mode of pleading suggested would have led to endless prolixity.

PATTESON, J. It is quite clear that, if the 66th section had stood alone, the *sci. fa.* would be a necessary remedy; and the only question, therefore, is, whether the remedy given by sect. 68 is to be a substitution for that, or to be cumulative on it. Sect. 68 contains no prohibitory words, and I see nothing in the construction of the statute which should lead us to hold that it is prohibitory. In my opinion, therefore, it is cumulative.

COLERIDGE, J., concurred.

Judgment for the plaintiffs.

REGINA v. HASLAM & another.¹

Trinity Term, June 11, 1851.

Poor Rates — Fixtures — Mechanical Apparatus.

Chambers, being large vessels of sheet lead, were erected in the open air upon the premises of the appellants, who carried on chemical works, in the following manner: Walls of strong masonry were built for the foundation, and the inside was filled with sand to a level with the top of the walls. The chamber rested upon the sand, and was encompassed by a framework of wood, which was used for its support, and to which it was attached by leaden rivets. Pipes for conveying the gases and vapors into and out of the

¹ 15 Jur. 972.

Regina v. Haslam & another.

chamber were fixed into buildings which were part of the freehold, but they might be removed at pleasure without injuring the freehold. When the pipes were withdrawn, the chamber rested on the ground by its mere weight, and, if sufficient force were used, might be lifted from the soil without displacing any part of the freehold:—

Held, that the ratable value of the premises was increased by the use of the chambers, inasmuch as they were used as part of the fixed machinery of the works attached to the other buildings for the purpose of being so used, and necessarily so attached in the use of them; and the premises, if underlet, would fetch a higher rent with the chambers upon them than they would if the chambers were removed.

Quære, whether the chambers were annexed to the freehold; and

Held, that whether they were or were not annexed to the freehold was a question of fact for the sessions.

UPON appeal against a poor rate, in which the appellants were assessed in the sum of 227*l.* as the occupiers of certain chemical works, land, tenements, erections, and buildings, the sessions confirmed the rate, subject to the amount being reduced, if this court should be of opinion that the appellants ought not to be assessed in respect of the chambers, which were part of their works, used in the manufacture of sulphuric acid. The case stated that the chambers were constructed in manner following: The said chambers are placed upon the land in the open air, and are not in any way enclosed in, or covered by, any building or erection. The chambers occupy large spaces of ground. Their respective lengths vary from forty feet to sixty feet; each of them is thirteen feet high, and the average width of each is about thirteen feet. Each of such chambers is a very large vessel of sheet lead, weighing several tons, and is composed of two parts; the lower part is a dish about twelve inches deep, in which the acid is deposited, and the upper part shuts down on the lower and receives the vapor. The mode of erecting such chambers is as follows: In some instances, the soil has been excavated for the purpose of erecting foundation walls of strong masonry; in others, these walls stand upon the natural level of the ground. The walls are built in the shape of an oblong, and the inside is filled with sand and other materials to a level with the top of the walls. The chamber rests on the sand; a sill, composed of four strong beams of wood, runs along the top of the wall, on which is fixed a framework of wood, which encompasses the chamber, and is used for its support. The chamber is attached to the framework by leaden rivets. In some of the more ancient chambers the sill is placed on mortar, which has been spread on the top of the walls for the purpose of preserving the level; but in some more modern instances, the sill rests on the top of the walls without the assistance or aid of mortar, or any other such substance. At each end of the chamber there is a pipe for the purpose of conveying the gases and vapors into and out of the chambers. Both pipes are, at their extremities, fixed into buildings which are part of the freehold; but the pipe which conveys the gas and vapor into the chamber enters the chamber in the following manner: A circular hole is cut into the chamber, through which the pipe is inserted, and the lead of the chamber is beaten round the pipe. The whole is rendered vapor tight, by means of a luting of white lead and other materials.

Regina v. Haslam & another.

The pipe which conveys the vapor from the chamber is fastened to the chamber in the same manner, and consists of several short pieces of pipe, which slide into each other like the joints of a telescope, and are rendered vapor tight by means of luting. It is necessary, in the process of manufacture, to convey steam into the chamber, and it is conveyed from the boiler by means of a pipe, which is attached to the framework before mentioned by leaden rivets. The boiler is affixed to the freehold, and the pipe at that extremity is affixed to the boiler. That pipe may be removed at pleasure, without injury to the freehold, by unfastening the rivets which attach it to framework; and the pipes conveying the gases into and from the chambers may also be removed at pleasure, and without injuring the freehold, by withdrawing the pieces of which the pipes are composed. When these pipes are so withdrawn, the chamber rests on the ground by its mere weight, and, if sufficient force were used, might be lifted from the soil without displacing any part of the freehold. The chambers are attached in manner before mentioned to the freehold, but are not affixed thereto. It was proved that personal property was not rated in the said township to the relief of the poor. Upon the above facts, the court found that the said chambers were attached in manner before mentioned to the freehold, but were not affixed thereto, and the court confirmed the rate, subject to the opinion of the Court of Queen's Bench. The questions for the opinion of the court are, first, whether, on the before-mentioned statement of the building and annexation, the said chambers are affixed to the freehold. Secondly, whether, if the said chambers are not, under the said circumstances of building and annexation, affixed to the freehold, the land and buildings are liable to be rated at a greater amount, by reason of the use of those chambers on the land. If the court shall be of opinion in the affirmative of either of the above questions, then the rate is to be confirmed; but if the court shall be of a contrary opinion on both of the above questions, then the ratable value is to be reduced as above. A rule had been obtained for quashing the order of sessions; against which, in this term,¹ —

R. Hall showed cause. First, the facts found by the sessions show that the chambers are fixtures. *Rex v. St. Nicholas, Gloucester*, 1 Bott's P. L. 150, pl. 180, 6th ed.; Cald. 262; 1 T. R. 723, note.

[*Coleridge, J.* In that case, there was no doubt that the subject matter was ratable.]

Here the masonry or brickwork connected with the chambers is ratable. [He also cited *Rex v. Hogg*, 1 T. R. 721.] Secondly, these chambers come within the principle laid down in *Rex v. The Staffordshire Gas-light Company*, 6 Ad. & El. 634; *Rex v. Guest*, 7 Ad. & El. 951; and *Reg. v. The Southampton Dock Company*, 15 Jur. 268; s. c. 3 Eng. Rep. 464.

Cowling, contra. First, the sessions have found that the chambers are "attached to the freehold, but not affixed thereto." Therefore, the

¹ May 31, before PATTESON, COLERIDGE, and ERLE, JJ. LORD CAMPBELL, C. J., had left the court.

Regina v. Haslam & another.

first question has been decided by the sessions. Secondly, the chambers are neither literally nor substantially fixtures, and, therefore, are not land within the meaning of the acts relating to the poor rate. The pipes, though fixed into buildings which are part of the freehold, are not used for the purpose of annexing the chambers to the ground. The chambers are nothing more than large pans or dishes, and retorts, which are the stock in trade of the tenant; the size and weight are immaterial.

[*Patteson, J.* If the occupiers were to underlet the works, they would get a higher rent on account of the chambers.]

A person who let a furnished house would get a higher rent on account of the furniture, but the furniture is not ratable; which shows that that is an unsafe test. Suppose the business of the tenant were to increase or decrease, could he not remove some of the chambers, or add more?

[*Coleridge, J.* The case does not find any thing as to the power of the tenant to remove the chambers.]

The case does not find that there is a practice for the lessor to demise these chambers to the tenant, and, therefore, they may be presumed to be the property of the tenant.

[*Erle, J.* All trade fixtures may be removed during the term; therefore, it is not material to decide whether they are fixtures or not. If the chambers are ratable in the hands of the landlord, they would be also in the hands of a tenant.]

In *Rex v. St. Nicholas, Gloucester*, 1 Bott's P. L. 150, pl. 180, 6th ed.; Cald. 262; 1 T. R. 723, *note*, the weighing machine was found to be a fixture. So also was the subject matter of the rate in *Rex v. The Birmingham and Staffordshire Gas-light Company*, 6 Ad. & El. 634. In *Rex v. Guest*, 7 Ad. & El. 951, the rate was laid upon the iron works, including the machinery, a great portion of which might consist of tenant's fixtures. But the test is, whether the things are substantially fixtures, so as to be considered part of the building. In that case, it was impossible to carry on the works without the machinery. Here the rate is not upon the furnaces, the boiler, and the chimney, from the use of which the vapors arise, but upon the chambers into which the vapors are conveyed: various other vessels might have been employed for receiving the vapors.

[*Coleridge, J.* How can the use of the thing be material? The question must depend upon the nature of the building. These chambers are as necessary for carrying on the works of the appellants as the crane in *Reg. v. The Southampton Dock Company*, 15 Jur. 268; s. c. 3 Eng. Rep. 464.]

In that case, the crane and other things were fixtures.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the court. We do not think it necessary in this case to determine whether the chambers erected on the appellants' premises are or are not annexed to the freehold, which is rather a question of fact for the Court of Quarter Sessions to find than for us to decide; because we are of opinion,

Doe d. Bourne v. Burton.

that, according to the principle laid down in the various cases on this subject, the ratable value of the premises is undoubtedly increased by the use of those chambers.

In *Rex v. The Proprietors of the Liverpool Exchange*, 1 Ad. & El. 465, the court, after citing several previous decisions, say, (p. 474,) "These cases establish the principle, that the advantages attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into the account in estimating its ratable annual value, wherever those advantages would enable the owner of the building to let it at a higher rent than it would otherwise fetch." And again, in *Rex v. Guest*, 7 Ad. & El. 951, 956, the court state the general principle to be, "that real property ought to be rated according to its actual value, as combined with the machinery attached to it, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under a *fi. fa.*, or whether it would descend to the heir or executor, or belong, at the expiration of a lease, to landlord or tenant;" and the court referred to *Rex v. The Birmingham and Staffordshire Gas-light Company*, 6 Ad. & El. 634, where the same principle was laid down.

All these cases have lately been brought before the court, and recognized as well decided, in the case of *Reg. v. The Southampton Dock Company*, 15 Jur. 268; s. c. 3 Eng. Rep. 464. Indeed, on the argument in the present case, the attempt was rather to show that the chambers did not come within the principle so laid down than to attack the principle itself; and it was urged that the chambers were rather of the nature of movable utensils or machines, or of furniture in a dwelling-house, than of fixtures. It is, however, plain from the facts stated, that they are used as part of the fixed machinery of the works attached to the other buildings for the purpose of being so used, and necessarily so attached in the use of them, although capable, perhaps, of being removed without injury to the other buildings. Nor can it be denied that if the appellants were to underlet the premises they would fetch a higher rent as they now stand, with these chambers upon them, than they would if the chambers were removed.

We are, therefore, of opinion that the rate and the order of sessions must be confirmed.

Order of sessions confirmed.

DOE d. BOURNE v. BURTON.¹

Easter Term, April 24, 1851.

Ejectment — Agreement — Acknowledgment of Plaintiff's Title.

Defendant being in possession of premises, entered into an agreement for the purchase of them. The purchase not being completed, the vendor brought ejectment:—

Held, that the agreement was an acknowledgment by defendant that the title was in the vendor.

¹ 15 Jur. 990.

Massey v. Goodall.

EJECTMENT to recover premises in Shepton Mallet, in the county of Somerset. On the trial, before Martin, B., at the Spring assizes for Somersetshire, it appeared that the defendant, being in possession of the premises, entered into an agreement with the lessor of the plaintiff to purchase them from him upon the following, among other conditions, viz., that the lessor of the plaintiff was to make out a good title within twenty-one days. If the purchase was not completed by a certain day, interest on the purchase money was to be paid from that time, and the defendant was to be entitled to the possession from the date of the agreement. It did not appear under what circumstances the defendant came into possession of the premises. The purchase not being completed, the vendor brought this action. Under the direction of the learned judge, a verdict was entered for the lessor of the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

Phinn now moved accordingly. The *prima facie* right to the premises is in the defendant. No tenancy was created between him and the lessor of the plaintiff by the agreement, nor is the agreement an acknowledgment of the title of the lessor of the plaintiff.

LORD CAMPBELL, C. J. The agreement amounts to an acknowledgment on the part of the purchaser that the title to the property was, at the time of the agreement, in the vendor; and, therefore, at the trial it was not necessary for the lessor of the plaintiff to give other evidence of his title.

PATTESON, WIGHTMAN, and ERLE, JJ., concurred.

*Rule refused.*¹

MASSEY v. GOODALL.²

Trinity Term, June 10, 1851.

Assumpsit — Pleading — Necessary Allegations.

Declaration in *assumpsit*, upon an agreement between landlord and tenant, containing, among others, a stipulation that defendant should not sell hay or straw grown on the farm during the tenancy, without the written license of plaintiff, alleged a breach of that stipulation: —

Held, by Lord Campbell, C. J., and Patteson, J., not necessary to allege that the breach occurred during the continuance of the tenancy. Erle, J., dissenting.

ASSUMPSIT. The declaration stated that the defendant became tenant to the plaintiff of a farm from year to year, upon the following, among other stipulations, viz., that the defendant should not sell

¹ See *In re Banks & another v. Rebbeck*, 15 Jur. 657; s. c. 5 Eng. Rep. 298.

² 15 Jur. 991.

Massey v. Goodall.

hay, straw, &c., grown or produced on the farm during the tenancy, without the written license and consent of the plaintiff; and that, by the agreement, certain penalties were to be paid by the defendant for non-performance of the stipulations. Breach, that the defendant did sell straw grown on the farm during the last year of the tenancy, without the written license or consent of the plaintiff. Plea, that the defendant did not during the continuance of the tenancy sell any hay straw, &c., grown on the farm during the last year of the tenancy, without the license or consent of the plaintiff. Demurrer, and joiner therein.

Cowling, for the defendant, was called upon by the court. The defendant did not become liable, by virtue of the agreement, to any penalties, except for selling during the existence of the term. The agreement is upon an executed consideration, and, as no request is alleged, the only promise which the law will imply is a promise coextensive with the relation established by the agreement; therefore, the words "during the term" must be imported into the agreement.

L. H. Bayley, contra. The court will not introduce any terms into a contract unless it is wholly unreasonable without them. There is nothing in this agreement to show that the stipulation as to the hay and straw is confined to the continuance of the tenancy.

LORD CAMPBELL, C. J. I am of opinion that the plaintiff is entitled to our judgment. The declaration only sets out the stipulations of the agreement, which have been broken by the defendant—that is to say, an absolute unqualified undertaking not to sell hay or straw grown upon the farm during the tenancy; and I think that the breach is well assigned, because it is within the words of the undertaking, and may be fairly considered within its meaning, because we have not the whole agreement before us, but one stipulation only. If the stipulation was confined to the space of time before the tenancy ended, the tenant might have hoarded up all the produce of the farm during the term, and, on the day after the tenancy expired, by holding over, he might sell it, without being guilty of any breach of the agreement. That certainly is not a reasonable construction of the stipulation. It may be said that it throws a hardship on the tenant; but there may have been other stipulations in the agreement, to the effect that the landlord should buy the hay and straw grown upon the farm during the tenancy, at a valuation; or that the incoming tenant should take it at a valuation. Here the defendant prevents the landlord from buying, and the incoming tenant also from having the benefit of the produce of the farm.

PATTESON, J. It is not necessary that any request should be laid in the declaration; that is only necessary when the consideration for the defendant's promise is past and by-gone. *King v. Sears*, 2 C. M. & R. 48. Then it is said that the law will not imply a promise

The Grantham Canal Company v. The Ambergate, &c., Railway Company.

by the tenant not to sell the produce of the farm after the expiration of the tenancy. I agree that the general rule is, that a past consideration will not support an implied promise; but here the declaration alleges that the defendant became tenant to the plaintiff upon certain terms; and, therefore, the law will imply a promise to perform them.

ERLE, J.¹ I put a different construction upon this agreement. It seems to me that it is entered into upon consideration of the relation of landlord and tenant, and that consideration pervades all its stipulations. If this was an imperfect agreement for a lease, as I should infer, and it contained no provision that the tenant should leave the produce of the last year on the farm at the end of the tenancy, the question would arise, Is the tenant bound to leave all the produce of the farm to the landlord gratis, or may he not dispose of it for his own profit? In the absence of any provision relating to it, I think that, as soon as the tenancy expires, he may remove it; and if so, it becomes his own property, and, therefore, he may sell or dispose of it as he pleases. The other construction would subject the tenant to a penalty for selling the produce, although the relation of landlord and tenant had been determined by his purchasing the farm in fee simple, and becoming the absolute owner of the land as well as the produce.

Judgment for plaintiff.

THE GRANTHAM CANAL COMPANY v. THE AMBERGATE, NOTTINGHAM, AND BOSTON AND EASTERN JUNCTION RAILWAY COMPANY.²

Trinity Term, June 10, 1851.

REGINA v. THE AMBERGATE, NOTTINGHAM, AND BOSTON AND EASTERN JUNCTION RAILWAY COMPANY.³

Trinity Term, June 13, 1851.

Railways — Stat. 9 & 10 Vict. c. 155, s. 73 — “Between,” Meaning of — Mandamus.

By sect. 73 of stat. 9 & 10 Vict. c. 155, for making a railway from Ambergate, through Nottingham, to Boston, and for enabling the railway company to purchase the Nottingham and Grantham Canals, it was enacted, that, “from and immediately after the opening of the railway between Ambergate and Grantham for public use,” the railway company should purchase the shares in both canals.

The railway had been opened for public use between Grantham and Nottingham, but not between Nottingham and Ambergate. The part opened was that which competed with the Grantham Canal; the part unopened was that which would compete with the Nottingham Canal. In an action by the Grantham Canal Company against the railway company to recover the price of the shares in their canal:—

¹ COLERIDGE, J., was in the Bail Court; WIGHTMAN, J., being absent.

² 15 Jur. 991.

The Grantham Canal Company v. The Ambergate, &c., Railway Company.

Held, that the railway had not been opened between Ambergate and Grantham for public use within the meaning of sect. 73. But, —

Upon an application by the Grantham Canal Company, the court issued a *mandamus* to the railway company to complete the railway between Ambergate and Grantham.

An application for a *mandamus* to a railway company to complete the railway may be made by a shareholder.

THE GRANTHAM CANAL COMPANY v. THE AMBERGATE, NOTTINGHAM, AND BOSTON AND EASTERN JUNCTION RAILWAY COMPANY.

THIS was an action to recover the sum of 120,000*l.*, being the purchase money of all the shares in the Grantham Canal Company, which, by sect. 73 of stat. 9 & 10 Vict. c. 155, the defendants were required to purchase "from and immediately after the opening of the railway between Ambergate and Grantham for public use." A special verdict found that the Ambergate, Nottingham, and Boston and Eastern Junction Railway had been opened for public use between Grantham and Nottingham, but not between Nottingham and Ambergate. The part opened, which was a distance of about seventeen miles, was that which competed with the Grantham Canal; the part unopened, which was a distance of about twelve miles, was the part which would compete with the Nottingham Canal, which belonged to a separate company, and which the defendants were also, by the same act, required to purchase "from and immediately after the opening of the railway between Ambergate and Grantham." The case was argued by

Peacock, (*Pearson* was with him,) for the plaintiffs. The question is, whether the event has happened, upon the happening of which the defendants are required to purchase the shares of the Grantham Canal Company. Stat. 9 & 10 Vict. c. 155,¹ is in the nature of a contract between the canal companies and the railway company, made when the act was applied for. The plaintiffs have no interest in the traffic between Nottingham and Ambergate. If the legislature had intended that the whole line should be opened, it would have said, in sect. 73, "immediately after the opening of the railway from Ambergate to Grantham for public use." The word "between" does not necessarily mean the whole distance from Ambergate to Grantham; the opening of any part of the line between Ambergate and Nottingham

¹ Stat. 9 & 10 Vict. c. 155, "for making a railway from or near the Ambergate station of the Midland Railway, through Nottingham, to Spalding and Boston, with branches therefrom, and for enabling the company to purchase the Nottingham and Grantham Canals," recited, among other things, that the Nottingham Canal Company, and the company of proprietors of the Grantham Canal Navigation, were desirous that the intended railways should be made and worked in connection with the said canals, and that the said canal companies should be thereafter united, consolidated, and incorporated with the railway company intended to be by that act incorporated.

By sect. 73, it was enacted, "that from and immediately after the opening of the railway between Ambergate and Grantham for public use, the company hereby incorporated shall be liable to pay to the committee of management for the time being of the Nottingham Canal Company, for the use of the persons who, at the time of the opening of the railway between Ambergate and Grantham, shall be the proprietors of

The Grantham Canal Company v. The Ambergate, &c., Railway Company.

satisfies the word. [He referred to the definition of the word "between" in Johnson's and Webster's Dictionaries.]

[*Patteson, J.* The words "between Ambergate and Grantham" are not descriptive of the railway, because, by sect. 119, the expression, "the railway," shall mean the Ambergate, Nottingham, and Boston and Eastern Junction Railway; those words are descriptive of the place where the railway shall be opened, and mean that portion of the railway which lies between Ambergate and Grantham.]

In the case of a prohibition against taking seaweed between high and low-water mark, the word "between" would mean any portion of the space between those points.

[*Lord Campbell, C. J.* Suppose the question was asked, in common parlance, "Has the railway been opened between Ambergate and Grantham?" would not the answer be that it had not, or that it had been opened, but not all the way to Grantham? Suppose it had been opened only for five miles.]

The railway is opened between Ambergate and Grantham, within the meaning of sect. 73, as soon as the railway company have put themselves in a position to complete it, and so to injure the canal of the plaintiffs.

Sir F. Kelly, (with him was *Wheeler*), contra. The word "between," in sect. 73 of stat. 9 & 10 Vict. c. 155, is to be understood in its ordinary colloquial meaning. The meaning of it is not to be determined by an extreme case, which would only exist for a colorable purpose. The provision for the purchase of the Grantham Canal is single, viz., "the opening of the railway between Ambergate and Grantham for public use;" it is not added, "or of any part thereof;" and upon that event both the Grantham and the Nottingham Canals are to be purchased. According to the construction contended for on the other side, if the railway was opened only as far as the first station, the railway company would be bound to purchase the shares of the canal companies.

[*Patteson, J.* By sect. 94, every person shall be deemed to be a proprietor of the Nottingham Canal and of the Grantham Canal who shall appear to be such in the books of the respective companies "at the time of the opening of the railway between Ambergate and Grantham for public use." According to that, a person would be in

the Nottingham canal, the sum of 225*l.*, for and in lieu of each share in the Nottingham Canal; and shall also be liable to pay to the committee of management for the time being of the Grantham Canal Company, for the use of the persons who, at the time of the opening of the railway between Ambergate and Grantham, shall be proprietors of the Grantham Canal, the sum of 160*l.*, for and in lieu of each share in the Grantham Canal, within six calendar months from the opening of the railway between Ambergate and Grantham."

By sect. 94, every person shall, for the purposes of this act, be deemed a proprietor of the Nottingham Canal who shall appear to be such in the books of that company at the opening of the railway between Ambergate and Grantham for public use. Every person shall, for the purposes of this act, be deemed a proprietor of the Grantham Canal who shall appear to be such in the books of that company at the opening of the railway between Ambergate and Grantham for public use.

The Grantham Canal Company v. The Ambergate, &c., Railway Company.

great doubt whether he had a right to transfer his shares in either of the canals until the railway between Ambergate and Grantham was completed.]

That clause could not be intended to apply where the railway was opened only as far as the first station.

[*Erle, J.* Suppose there was a clause in the act prohibiting the railway from being opened between Ambergate and Grantham until a certain sum was paid by the company; is the money never due unless the railway reaches Ambergate?]

Peacock, in reply.

[*Patteson, J.* Suppose there was one canal for the whole distance between Ambergate and Grantham, would you have contended that the clause was distributive?]

Yes; the traffic of the canal would be prejudiced by the opening of part of the railway.

LORD CAMPBELL, C. J. This is a contract between parties, and is certainly very ill framed with reference to the interests of the canal company, which it leaves exposed to considerable hardship; but we must put that construction upon it which the words of the statute naturally bear. [His lordship read sect. 73.] Has that portion of the railway which lies between Ambergate and Grantham been yet opened for public use? I cannot say that it has. Looking at this statute, it appears that it contemplates one epoch at which many things are to take place—the two canals are to be purchased, and the proprietors of each are to have various rights, depending upon the happening of the same event, viz., the opening of the railway between Ambergate and Grantham for public use. All is regulated by that. The legislature must have meant something, the happening of which would be notorious and easy to be ascertained; and, looking at the words with reference to the context, I think that event is the substantial completion, and the opening for public use, of the whole of that part of the line of railway which lies between Ambergate and Grantham. If it was completed within two hundred yards, and left unopened, the railway company would not be allowed so to evade their contract, because a jury, under such circumstances, would not hesitate to find that the whole line had been opened. But on this special verdict it is impossible to say that, substantially, the whole railway has been opened for public use *between* Ambergate and Grantham, in the sense of the word intended by the act; and therefore, unless the completion and opening of any considerable portion is sufficient, the defendants are entitled to our judgment.

I may add, that the plaintiffs are not entirely without remedy, because this is a contract on the part of the railway company to make their railway, in the performance of which the canal companies have an interest; and if application is made in proper time, this court would order the railway company to perform it, by completing their railway; and as soon as that was done, the obligation on the part of

Regina v. The Ambergate, Nottingham, &c., Railway Company.

the railway company to make the purchase would arise. But this action is premature.

PATTERSON, J. The words in sect. 73, "from and immediately after the opening of the railway between Ambergate and Grantham for public use," must mean the opening of so much of the line of railway as lies between Ambergate and Grantham; the opening of part only does not satisfy those words. The clause is not to be construed distributively; all through the act notice of option is required to be given by both companies at one and the same time, not respectively.

ERLE, J.¹ If there was one canal only between Ambergate and Grantham, and one railway authorized to be constructed running parallel to it, it might be successfully contended, that the opening of any part of the railway would satisfy the words of the 73d section; but where the railway is to be constructed parallel to two distinct canals, and the opening of it between two places, comprising the length of both canals, is made the condition upon which the railway company is to purchase both canals, that construction cannot be maintained.

Judgment for defendants.

REGINA V. THE AMBERGATE, NOTTINGHAM, AND BOSTON AND EASTERN JUNCTION RAILWAY COMPANY.

Trinity Term, June 13, 1851.

RULE calling upon the Ambergate, Nottingham, and Boston and Eastern Junction Railway Company to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to make and complete the railway between Ambergate and Grantham, in pursuance of the powers and provisions of stat. 9 & 10 Vict. c. 155. On the 15th of May, 1848, a report was made by a committee of the directors to a general meeting of the railway company, recommending that the railway should not be completed farther than a certain station towards Ambergate. In March last, Henry Thompson, one of the shareholders of the railway company, gave notice to the directors of the railway company to complete the line of railway from Ambergate to Grantham. This application was made by Henry Thompson and the Grantham Canal Company.

Sir F. Kelly and Wheeler showed cause. First, Henry Thompson, being a shareholder, is barred by his laches, in not making an application sooner after the resolution of the committee of the directors was reported to the shareholders.

[*Lord Campbell*, C. J. This writ is necessary, irrespective of that

¹ COLERIDGE, J., was in the Bail Court; WIGHTMAN, J., being absent.

Regina v. The Ambergate, Nottingham, &c., Railway Company.

resolution; though, if you show that Henry Thompson joined in passing it, his mouth may be stopped.]

Secondly, there was no sufficient demand. The present application is different from what was required by the notice given by Henry Thompson, in March.

[*Lord Campbell*, C. J. What is now required is included in that notice.]

The canal company is making use of a notice given with a different object. The application for a *mandamus* ought to be made by the person who made the demand, or, at least, the party applying for the *mandamus* ought to show that the person who made the demand could have acted upon it.

Peacock, (*Pearson* was with him,) contra.

[*Patteson*, J. Is there any instance of such an application as this made by a shareholder?

Coleridge, J. Suppose there is a personal objection to Henry Thompson, can the railway company avail themselves of it?]

A shareholder is one of the public specially interested in the undertaking, and he has subscribed his money with a view to its completion, and upon the faith of the parliamentary contract contained in the special act.

[*Patteson*, J. By this application, he calls upon himself to do an act.

Lord Campbell, C. J. He might be one of the shareholders who had opposed the resolution for not completing the railway. If he is not shown to have joined in that resolution, I do not see why it should prejudice his present application.

Patteson, J. In *Reg. v. The Eastern Counties Railway*, 10 Ad. & El. 531, the application for a *mandamus* was made by shareholders of the company as well as land owners. (See pp. 539, 549.)]

LORD CAMPBELL, C. J. No doubt was thrown out by any member of the court in *The Grantham Canal Company v. The Ambergate, Nottingham, and Boston and Eastern Junction Railway Company*, that it is compulsory upon the railway company to complete the line of railway to Grantham.

ERLE, J. Stat. 9 & 10 Vict. c. 155, is a contract by the railway company with the canal company that they will complete it, and then purchase the shares of the canal company.

PATTESON and COLERIDGE, JJ., concurred.

Rule absolute.

Brown v. Clegg.

BROWN v. CLEGG.¹

Hilary Vacation, February 22, 1851.

Local Improvement Act — Construction.

By one clause of a local improvement act, power was given to commissioners "to cause the present and future streets, &c., and other public places, to be paved, &c., and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner, as they should think fit." By other clauses, the commissioners were authorized to give notice to the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring them to pave and flag the same, and in case of their neglecting to do so, then the commissioners were empowered to pave and flag the same, and to recover the expenses from the owners or occupiers, and to declare streets so paved to be highways, and to take upon themselves the future paving of such streets; but no power was given in those sections to alter the level of the streets.

The commissioners had given the notice required by the latter sections with regard to a street which was built upon, but had never been paved or flagged; and upon the neglect of the owners or occupiers, proceeded to do the work themselves. Instead, however, of merely paving the street, they cut down a steep ascent, and greatly lowered the level of the street opposite the plaintiff's houses:—

Held, that they were not justified in so doing, and were liable in trespass.

TRESPASS *quare clausum fregit*, whereby the plaintiff's houses were injured. The declaration contained two counts.

The 5th and 10th pleas were the same, being pleaded to the first and second counts respectively. They alleged in substance that the close in the declaration mentioned was a public street within the township of Oldham, called Greaves Street; and that the commissioners, under a local act, (7 Geo. 4, c. 117,) had thought it proper and necessary to cause, and had caused, the said street to be paved and flagged, &c., and the ground and soil thereof to be lowered.

Replication — *De injuria*, and new assignment.

At the trial, which took place before Cresswell, J., at Liverpool, during the last Summer assizes, a verdict was found for the defendant on the issues raised upon the 5th and 10th pleas. The plaintiff was the owner of houses in Greaves Street, in the town of Oldham, and the defendant represented the improvement commissioners of that town. Greaves Street had been partially built upon for some years, but some of the houses had been only recently built; it was not a thoroughfare, and the street had not been regularly paved or flagged, though some of the owners had put down flagstones in front of their own houses. The commissioners had given notice to the owners and occupiers of the houses in Greaves Street to pave it and put it in good order; and upon their neglecting to do so, the commissioners, by a resolution, undertook the work, and a contract was entered into for the purpose. In the execution of that work, in order to get rid of a steep ascent, the level of the street had been lowered in some places as much as three feet six inches; and the soil of the plaintiff in front of his houses had been cut away.

¹ 17 Law T. Rep. 122.

Brown v. Clegg.

A rule *nisi* having been obtained to enter the verdict for the plaintiff, with 40s. damages, on the 5th and 10th issues, on the ground that the commissioners had exceeded their powers, —

Knowles and *Cowling* showed cause on the 10th of February, before Patteson, Coleridge, Wightman, and Erle, JJ.

Watson, Crompton, and Spinks, contra.

The following authorities were cited: *Boulton v. Crowther*, 2 B. & C. 703. *Leader v. Moxon*, 3 Wils. 461. *Casher v. Holmes*, 2 B. & Ad. 592. *The Mayor of Salford v. Ackers*, 16 Mee. & W. 85. The stat. 10 & 11 Vict. c. 34, was also referred to.¹

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the court. It appeared by the evidence that Greaves Street, in which the plaintiff's premises were situated, had not, before the time in question, been paved or flagged. Part of the houses in the line of street had been built recently, and the evidence as to the state of the street was such as to give a jurisdiction to the commissioners to proceed under sects. 55 and 56 of the act of Parliament; but as those sections were not

¹ The following are the material sections of the local act: —

Sect. 53. And be it further enacted, That it shall and may be lawful to and for the said commissioners, and they are hereby authorized, empowered, and required, from time to time, when and so often and in such manner as they shall think proper and necessary, to cause the present and the future streets, highways, lanes, passages, and other public places, as well carriage as foot-ways, within the said township, and each and every of them, and each and every or any part or parts thereof respectively, to be paved, flagged, or otherwise constructed, repaired, and amended, supported, and kept in good order and condition, and the same, and the pavements, flagging, and other materials thereof, to be taken up and relaid, and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner and with such materials as they, the said commissioners, shall think fit.

Sect. 54. Power to declare new streets to be highways, provided they are of certain widths.

Sect. 55. And be it further enacted, That it shall and may be lawful to and for the said commissioners, and they are hereby required, at any meeting to be by them held under this act, to cause all such parts of the public streets, ways, and passages within the said township, which are now built upon, but not paved, flagged, and cleansed, and all such other public streets, ways, and passages within the said township which are now making, or being built upon, or which may hereafter be made or built upon, and all other streets, lanes, avenues, ways, or passages within the said township, which are now making or being built upon, or shall or may hereafter be made or built upon, but not laid open to the public, which now have or shall hereafter have messuages or other buildings erected at the respective sides thereof, which buildings, with the respective yards, courts, gardens, and other conveniences thereto belonging, shall be fronting to the said last-mentioned respective streets, avenues or passages, to the extent of two third parts of the aggregate length of such last-mentioned streets, avenues, ways, or passages, either in a continued line or not, and whether enclosed or not, to be made, paved, set, flagged, and cleansed, or otherwise repaired, amended, supported, and put in good order and condition, in such manner and with such materials, and with such and so many soughs, sewers, gutters, sinks, drains, or watercourses, in, through, over, or under the same, as to them the said commissioners or their surveyor or surveyors shall seem meet and necessary; and the charges or expenses attending, or in any manner relating, to such new pavements, flaggings,

Brown v. Clegg.

taken to justify the act that had been done by the defendant, they resorted to sect. 53; and the fifth plea raised the question whether the 53d section applies to a street in the circumstances of Greaves Street, and we think that it does not. The meaning of the statute would be less doubtful if the order of the sections was transposed. Sect. 56 enacts that the commissioners, before they pave a street in the state of Greaves Street, which we may call a new street, must give notice to the occupiers or owners to do the paving in a sufficient manner. Sect. 55 enacts, that if the owners make default for six months after such notice, the commissioners may do the paving, and charge the expenses on the occupiers or owners. Sect. 54 enacts, that when a new street has been made complete as to paving and some other requisites, the commissioners may declare it a highway, and take upon themselves the repair of the paving for the future. Sect. 58 enacts, that when a new street has been completed as to the paving and the other requisites by the commissioners, and the owners and occupiers of land have paid the expenses, the commissioners may declare it a highway, and take the repair of the paving for the future. The provision in these sections applies specifically to a new street, such as Greaves Street, and the commissioners intended at first to act under them, and they gave the notice under the 56th section, and proceeded to do the

cleansings, drainings, or otherwise putting into good repair and condition, shall be paid and reimbursed to the said commissioners by the owners or occupiers of the houses, buildings, courts, yards, gardens, ground, or land within or adjoining the said streets, ways, and passages so to be new made, paved, flagged, drained, and cleansed, or otherwise repaired, amended, supported, and put in order and condition as aforesaid, each and every such owner or occupier paying an equal share or proportion thereof, according as such new making, paving, flagging, draining, cleansing, or repairing is or shall be either before, behind, or at the side of his or their house or houses, building or buildings, courts, yards, gardens, ground or land as aforesaid; and such share shall be ascertained by the surveyor or surveyors of the said commissioners, to be appointed under and by virtue and in pursuance of this act; and if any such owner or occupier shall at any time neglect or refuse to pay such charges and expenses within fourteen days after the same shall have been demanded by or on behalf of the said commissioners, the same shall and may be levied by distress and sale of the goods and chattels of such owner or owners, or occupier or occupiers, in like manner as the rates hereinafter authorized to be raised and levied are directed to be recovered; the overplus (if any) of the moneys to arise thereby, after deducting such charges and expenses as aforesaid, and the costs and expenses attending such distress and sale, being returned to such owner or occupier.

Sect. 56. Provided always, and be it enacted, That before the said commissioners shall cause the said public streets, ways, and passages within the said township which are now built upon, but not made, paved, flagged, cleansed, or otherwise put into good order and condition, and all such other streets, avenues, ways, and passages within the said township which are now making, or being built upon, or may hereafter be made, laid out, or built upon, or such thereof respectively as may require the same, to be so made, paved, flagged, cleansed, or otherwise repaired, amended, supported, and put in good order and condition in such manner and with such materials, and with such and so many soughs, gutters, sinks, drains, or watercourses, as to them, the said commissioners, shall seem meet and necessary as aforesaid; they shall, in the first place, cause their surveyor or surveyors to give or leave a notice in writing under his or their hand or hands to or at the last usual place of abode of the owner or owners, or occupier or occupiers, of each and every house, building, tenement, parcel of ground, lands, or hereditaments within the said streets, avenues, ways, or passages so to be paved, flagged, and cleansed, or otherwise put in good order and

Brown v. Clegg.

work themselves shortly after the expiration of the six months from the notice. And if they had kept within the provisions of the sections, they would have been justified. But in cutting down in the street the steep ascent, and lowering the level of the way, they went beyond the powers given them under that provision. They have, therefore, adapted their plea to the 53d section, which enacts that the commissioners may, from time to time, cause any present or future streets to be paved and repaired, the ground or soil thereof to be raised, lowered, or altered in such manner as they think fit. We think this section does not apply, because it is general and applicable to all streets; and it is followed by a special clause applicable to new streets, such as Greaves Street, which would be inoperative if the general clause included the streets specified and provided for. For a new street the commissioners are to give notice, and in case of default in pavement to charge the expense to the owners; and when it has been paved by the owners, they may undertake the pavement for the future. These provisions do not consist with a discretionary power of paving all new streets without giving any notice. It seems to us the 53d section applies to old streets and streets that are declared highways under the sections above cited, and to streets to which the other sections do not apply; and even if the 53d section had applied to Greaves Street, it

condition as aforesaid, requiring him, her, or them, to make, pave, flag, cleanse, drain, or otherwise repair, amend, and put the same into good order and condition, in such manner and with such materials as they shall direct, either before or behind, or at the side of his, her, or their house, building ground, land, hereditaments, and premises, (as the case may be or require,) and in case any such owner or occupier shall neglect or refuse for the space of six calendar months next after the receipt of such notice, or the same being so left as in manner aforesaid, to make, pave, flag, cleanse, or otherwise repair, amend, and put the same into good order and condition, in such manner and with such materials as the said commissioners shall direct, either before, behind, or at the side of his, her, or their house, building ground, land, or hereditaments as aforesaid; that then and in such case it shall and may be lawful to and for the said commissioners, and they are hereby required to cause the same to be done, in such manner and with such materials as they shall direct, and to recover the costs, charges, and expenses thereof from such owner or occupier, in case of refusal to pay the same, in any manner in which any rates or penalties may be recovered under this act.

Sect. 57. Occupiers may retain expenses of paving from rent.

Sect. 58. And be it further enacted, That when the said commissioners shall have caused any of the public streets, ways, and passages within the said township which are now built upon, but not made, paved, and cleansed, or otherwise repaired, amended, supported, and put in good order and condition, and any other public streets, or other streets, roads, ways, and passages within the said township, now making or being built upon, or hereafter to be made or built upon, to be made, paved, and cleansed, or otherwise repaired, amended, and put in good order and condition, as aforesaid, to the satisfaction of the said commissioners, and the charges and expenses attending the same shall have been paid and satisfied by the owners or occupiers of the houses, buildings, grounds, or land within the said streets, it shall and may be lawful for the said commissioners, or any seven or more of them, at any meeting to be held by virtue of this act, upon the application of the owner or owners of the soil, of such streets, ways, and passages, or of the greater part in value of such owners to declare such streets, ways, or passages to be public highways, and thenceforth the same and every of them, and every part thereof, shall be deemed and taken to be public highways to all intents and purposes, and be cleansed, maintained, and kept in repair by the said commissioners out of the rates to be levied by virtue of this act.

In re Barber.

seems to us they would not be justified in lowering the level for a purpose unconnected with the repairing and pavement. The power of raising or lowering the level is mentioned, and united by the context with paving and repairing, and the manner of, and materials for, paving and repairing. Also, as there is no power for compensating individual losses, where the level is altered for the public benefit, it seems improbable that general powers of altering levels to an unlimited extent should have been intended; and as damage resulting therefrom may be very serious, if an unlimited power was intended, the context leads to the conclusion that the power was limited to the requirements for paving and repairing pavement; and if the power is so limited, it will not afford a justification in the present instance. The result will be that the plaintiff is entitled to a verdict, which is to be entered as the parties have agreed.

Rule absolute.

*In re BARBER.*¹

Trinity Term, June 4, 1851.

Attorney — Misconduct — Renewal of Certificate.

If an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained.

* LORD CAMPBELL, C. J. We have deferred giving our opinion upon the fresh application in this case made in last Easter term, that we should have an opportunity to peruse the additional affidavits, and to reconsider the judgment formerly pronounced by the court in discharging the rule granted to show cause why Mr. Barber's certificate as an attorney should not be renewed. Having done so very deliberately, and without regard to any technical difficulties which might have stood in the way of our giving full effect to any equitable circumstances, we are deeply concerned to be obliged to declare that we see no sufficient reason for altering the view before taken of his conduct in these transactions. I may mention that, although I had not the honor to be a member of this court when the former judgment was pronounced, I have several times perused that most elaborate judgment, and I entirely concur in the conclusion at which my learned brothers have arrived — that if Mr. Barber was not directly cognizant of the frauds in the forgery cases, or some of them, it was because he must have been wilfully blind, and did not choose to inquire into the character of these transactions. If such was the state of his mind when acting as Fletcher's attorney and enabling that

¹ 17 Law T. Rep. 142.

In re Barber.

wicked man in four successive cases to avail himself of forged wills, although he might not be a party to the forgeries, surely he is not a fit person to be permitted to practise as a solicitor. Had he been merely the dupe of Fletcher, God forbid that he should be debarred from the exercise of his profession, even if he were chargeable with a high degree of indiscretion and supineness; but if an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and to give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained, and although, to carry on the imposture, persons may be introduced to him acting in a feigned name. The principle on which the court proceeded cannot, therefore, be disputed; and I think that the proof supported the inference they drew. In the new affidavit, we find no facts brought forward to alter our opinion. Fletcher's exculpation of Mr. Barber is made more distinct and prominent; but from long experience we have learnt that little weight is to be given to the statements of such a convict as Fletcher, and he leaves untouched the main facts on which we consider suspicion, amounting to complicity, must have entered Mr. Barber's mind. Unfortunately for Mr. Barber, we are greatly strengthened in the belief that a just view of his conduct was before taken by the court, from the information he has afforded us in his new affidavit as to the principles on which he acted. In commenting on one of the cases of forgery, he saith, "that the instructions given to me by the said J. Fletcher neither in this case nor in any other case involved or directed any deceit, misstatement, or misrepresentation, nor even any suppression of the truth on the part of this deponent, except so far as might be necessary to prevent parties from setting up unfounded claims, or sustaining claims that were well founded to the prejudice of the said J. Fletcher's title to just and reasonable compensation; denies that he ever practised any deceit or any suppression of the truth, except so far as, in the exercise of what he considered to be a sound professional consideration, was necessary to avoid the success of unfounded claims tending to litigation, and to secure such a compensation as aforesaid to a client whose business was valuable to this deponent, and whose character and objects he had at that time no reason to distrust." This remarkable passage seems to us to afford a clew to Mr. Barber's whole conduct, and confirms us in the belief that, although he might neither have contrived the forgeries, nor been privy to the execution of them, he chose to be ignorant of all the particulars which it would have been inconvenient for him to know, and that he wilfully abstained from making such inquiries as a respectable attorney ought to have made, because he felt he must either have declined the business and quarrelled with Fletcher, or have become an active party to the transactions, however guilty they might have turned out. Adhering to the principle of the former decision, and finding nothing in the affidavit to induce us to vary from the conclusion of fact which the court have taken, we are bound to refuse

Chichester v. Hall & another.

the rule to show cause, which was moved for by Mr. Roebuck; and we wish it to be understood that this is our final judgment, which the misconduct of the individual has drawn down upon him, and which a due regard for the pure administration of justice has required us to pronounce. There will, therefore, be no rule.

CHICHESTER v. HALL & another.¹

Easter Term, April 29, 1851.

Copyhold — Heriot — Quitrent — Statute of Limitations — Presumption.

In trover for a heriot, it was proved by entries in the court rolls of a manor that, down to the year 1804, the land in respect of which the heriot was claimed was freehold land, held of the lord by heriot, quitrent, relief, &c. On the death of a tenant, in 1804, a heriot was seized. In 1824, the next tenant died; but there was no entry of any seizure of a heriot on that occasion, or of any reason for the omission. In 1826, the present lord came into possession; and in 1847, upon the death of the next tenant, the heriot now claimed was seized. Since 1804, no quitrent or relief appeared to have been demanded or paid, nor any service of any kind rendered to the lord of the manor:—

Held, that the lord's right of action was not barred by sect. 2 of 3 & 4 Will. 4, c. 27, and that there was no ground for presuming that the tenure of the lands had been changed, or even that the heriot had been released by the lord.

Semble, that the right to the quitrent was barred by the statute.

THIS was an action of trover for certain horses; to which the defendants pleaded that the plaintiff was not lawfully possessed of the same as of his own property, as in the declaration alleged; on which issue was joined.

The action was commenced on the 7th day of January, in the year of our Lord 1849, and came on for trial at the Lent assizes, in the same year, for the county of Sussex. At the trial, a verdict for the plaintiff was taken by consent for the damages mentioned in the declaration, subject to the opinion of the court on the following case:—

The plaintiff is lord of the manor of Southmalling Lindfield, in the county of Sussex, and was so at the time of the death of Mr. Commerell, hereinafter mentioned.

The said manor of Southmalling Lindfield comprises freehold, copyhold, and leasehold tenements. The court rolls of the said manor describe the freehold tenants of the said manor as holding freely of the lord by fealty, suit of court, heriot, and relief, when they shall happen, and a yearly quitrent for every freehold tenement. The heriot is due on the death of a tenant of the lord dying solely seized, but no heriot is due on alienation. Relief is due on the entry of a new tenant of the lord, whether upon death or alienation. The heriot

¹ 17 Law T. Rep. 121.

Chichester v. Hall & another.

is the best or such other beast belonging to the deceased tenant at the time of his death as the lord chooses to take, and, where no dispute has arisen, has usually been compounded at two thirds of its value. The relief is the amount of one year's quitrent. The quitrent is a small sum for such tenement. The defendants are the legal personal representatives of the late Mr. J. W. Commerell. The said Mr. Commerell, at the time of his death, was seized in fee of a freehold estate in the parish of Worth, in the said county of Sussex, containing about 140 acres, usually known by the general name of the Bower Place Farm, all of which is within the said manor of South-malling Lindfield.

The Bower Place Farm consists of, besides a few acres of leasehold, five distinct tenements, which are described in entries down to 1804 in the court rolls of the said manor as freehold of the said manor, and by the following description :—

	Paying yearly quitrent.		Supposed to contain		
	<i>s.</i>	<i>d.</i>	<i>a.</i>	<i>r.</i>	<i>p.</i>
Part of Burby	0	7	17	1	13
Bower Place	1	7	41	1	2
Park Field and Tilt Wood	0	11	31	2	28
Mays	0	9	21	1	9
Beldams Croft	0	9	3	2	26

These five tenements were anciently held by different freehold tenants of the manor, but a little before the year 1735 they were all held by a freehold tenant, of the name of Charles Goodwyn, from whose descendant they passed to a person of the name of George Bethune, who, down to and at his death in 1804, was tenant thereof under the lord of the manor. George Bethune was tenant for life. His wife, and their son, George Maximilian Bethune, who was entitled to the reversion in fee, in the year 1802, for a nominal consideration, conveyed the same tenements to certain trustees for sale in fee, with the consent in writing of the said George Bethune during his life. In 1811, the surviving trustee sold by public auction in London, and conveyed the same tenements to Richard Baker in fee, and he continued seized thereof in fee, and in receipt of the rents, and in the enjoyment of the same down to his death in 1824. By his will he devised the same tenements to certain trustees in fee. In the year 1825, the trustees of Richard Baker's will sold and conveyed the same tenements to the said Mr. Commerell in fee, and he continued seized in fee, and in receipt of the rents and in the enjoyment of the same, until his death. On the 22d of December, 1847, Mr. Commerell, by his will, devised the same five tenements to his grandson in tail. Mr. Baker did not at any time reside in the county of Sussex. On the property being conveyed to him, there was no change of occupation, nor was there any act done to bring it to the knowledge of the lord that the property had changed owners. But Mr. Baker was mentioned as the owner in the assessment to the land tax for several years. At the time of his death the said Mr. Commerell was possessed of certain horses, including those in the declaration mentioned,

- Chichester v. Hall & another.

which were seized as heriots as next mentioned. On the 27th of December, 1847, the reeve of the said manor of Southmallig Lindfield, in the name and by the authority of the lord of the said manor, seized at the residence of the said late Mr. Commerell, as heriots, in respect of the said five freehold tenements, thus claiming them to be tenements of the said manor, five horses of the said late Mr. Commerell. The defendants, who are the legal personal representatives of the said late Mr. Commerell, afterwards obtained and kept possession of the horses that had been so seized, and on their refusal to give them up, or to pay any composition for them to the lord of the manor, the present action was brought.

No fealty or suit of the court was rendered by the trustees of George Bethune's conveyance for sale by Richard Baker, by the trustees of his will, by the late Mr. Commerell, or by his devisee; nor was the fealty of any of these parties ever respited, rendered, compounded for, or demanded; there is no entry in the court rolls in respect thereof, nor do the titles of these parties, nor any of them, appear; nor is there any entry in the court rolls of the alienation to them, or acknowledgment of their tenure, nor do their names, or any of them, appear in the court rolls; and with respect to fealty and suit of court generally, no entry of their having been rendered appears in the court rolls for a hundred years and upwards, by any tenant of the manor.

At Mr. Richard Baker's death, in 1824, no heriot was seized, rendered, compounded for, or demanded, in respect of the said five tenements, or any of them, nor is there any entry in the court rolls in respect thereof.

It does not appear whether he died solely possessed of any live animal, nor does it appear whether, supposing him to have died solely possessed of some live animal, such live animal might not have been seized by the lord of some other manor, or *bona fide* disposed after his death, before the lord of the manor of Southmallig Lindfield could seize.

Upon the entry of Richard Baker in 1811, and the entry of Mr. Commerell in 1825, a relief became payable by him to the lord, if he was at that time tenant of the said five tenements under the lord; but no relief was taken, rendered, paid, or demanded from or by him, nor is there any entry in the court rolls in respect thereof.

No quitrent has been taken, rendered, paid, or demanded from 1804 to the present time, in respect of the said five tenements, or any of them, nor is there any entry in the court rolls in respect thereof. Heriot had been seized for these five tenements in various instances on the death of persons recorded on the court rolls as dying seized thereof previously to the tenancy of the Goodwyns, on the death of Charles Goodwyn in 1735, and on the death of George Bethune in 1804.

The lord of the manor who seized the heriots for the said five tenements in 1804 was Thomas, first Earl of Chichester, who was then tenant for life of the said manor, with remainder to his eldest son Thomas, afterwards second Earl of Chichester, for life, with remainder to his eldest son in tail. Thomas, first Earl of Chichester, died in

Chichester v. Hall & another.

1805; Thomas, second Earl of Chichester, died on the 4th of July, 1826; whereupon the plaintiff, the present earl, as his then eldest son, became tenant in tail in possession of the said manor.

The defendants contended, on these facts, that the plaintiff had no right to seize heriots for these tenements on Mr. Commerell's death. The plaintiff contended that he had such right.

If the court should be of opinion, on these facts, that the plaintiff had no right to seize heriots for these tenements on the death of Mr. Commerell, the verdict which has been entered for the plaintiff is to be set aside, and a verdict entered for the defendants. If the court should be of opinion that the plaintiff had such right, the verdict for plaintiff is to stand, but the amount is to be reduced to 117*l.*, which is agreed to be the value of the five horses that were seized.

In considering this case, the court is to be at the same liberty to draw inferences, and presumptions from the facts that a jury would be.

Creasy, (*Channell*, Serj., with him,) for the plaintiff. This action is not barred by the stat. 3 & 4 Will. 4, c. 27, s. 2, for, in the first place, that statute applies only to heriot service, which may be recovered by distress, and not to heriot custom, which lies in *prendre* only; and in this case the heriot claimed appears to be heriot custom. *Lanyon v. Carne*, 2 Wms. Saund. 166. Scriven on Copyhold, c. 8, p. 445. *Damerell v. Protheroe*, 10 Q. B. Rep. 20.

[*Erle*, J. If heriot custom lies in *prendre* only, it seems not to be within sect. 2, which only prohibits the making of an entry or distress, or the bringing of an action after the time limited.]

In *Grant v. Ellis*, 9 Mee. & W. 113, it was held that that section does not apply to rent reserved on a demise. But, secondly, if the statute does apply to heriot custom at all, the limited period has not expired. Heriots can only become due at irregular and generally long intervals; so that the twenty years do not begin to run from the last receipt, which was in 1804.

[*Patteson*, J. In *Owen v. De Beauvoir*, 19 Law J. Rep. (N.S.) Exch. 177, which was the case of a quitrent, the Court of Exchequer Chamber was compelled to hold that the period began to run from the last payment.]

That was a case to which that provision in sect. 3 would apply; but sect. 3 is to be taken distributively, according to *James v. Salter*, 3 Bing. N. C. 544; and in this case, the right would first accrue at the time of dispossession. Upon the death, in 1824, even if there was any evidence of a dispossession against the last lord of the manor, still, as the plaintiff only succeeded to the lordship in 1826, that evidence does not affect him. He asserts his right on the first occasion which presents itself, and has never been dispossessed; but, in 1824, it does not appear whether the tenant died solely seized of any live animal which could be seized as a heriot, and in the absence of any evidence on that point the omission is of no weight.

Bovill, contra. During forty-five years, not one single incident of this supposed tenure has occurred; and the court will, from that

Chichester v. Hall & another.

circumstance, presume an extinguishment of the tenure. That might be done by a release either of the whole right of the lord, or of some particular incidents of the tenure.

[*Lord Campbell*, C. J. There might be a release of certain particular incidents without any extinguishment of the tenure.]

There is no authority for the position that a release of the heriot would change the tenure. *Doe d. Reay v. Huntington*, 4 East, 270. *Bradshaw v. Lawson*, 4 T. R. 443.

[*Lord Campbell*, C. J. Those were cases of customary freeholds, which are held by a different tenure altogether. See *Vaughan v. Atkins*, 5 Burr. 2764.]

The right to the quitrent is clearly barred by the statute. *Doe v. Sumner*, 14 M. & W. 41. *Owen v. De Beauvoir*, 16 M. & W. 547; s. c. in Error, 19 Law J. Rep. (N. S.) Exch. 177. But it is said that the statute does not apply to heriot custom; the answer in this case is, that this is heriot service, for the case states that the land is held of the lord by quitrent, heriot, fealty, &c. Then the last receipt of a heriot is, according to *Owen v. De Beauvoir*, the point from which the time begins to run, and that was in 1804. The omission to take a heriot in 1824 is not explained by saying that the tenant at his death may not have been possessed of any live animal which could be seized; for the jury, if asked, would presume that fact; and if that was the reason for the omission, it ought to have been entered on the court roll.

[*Erle*, J. In 1804, the present Lord Chichester had only an estate in remainder. In 1826 his right accrued, and he claims the first heriot that he could.

Lord Campbell, C. J. So no relief has been due since 1825.]

It is difficult to contend that the right to the heriot is barred by the statute; but the quitrent is, and then the court will presume, from all the circumstances, a release of the heriot. The doctrine of presumptions has been carried very far in many cases. *Roe v. Ireland*, 11 East, 280. *R. v. Montague*, 4 B. & C. 598. *Eldridge v. Knott*, Cowp. 214. *Hawke v. Bacon*, 2 Taunt. 156. *Creach v. Wilmot*, Ib. 160.

Creasy, in reply. There is no ground for the presumption suggested. At the most, there has been but a single omission to take a heriot. He cited Taylor, Evid. 135. *Doe v. Cook*, 6 Bing. 159. *Doe v. Ozenham*, 7 Mee. & W. 131.

LORD CAMPBELL, C. J. I am of opinion that the plaintiff is entitled to our judgment. Mr. Bovill has properly admitted that the statute does not operate as a bar. His argument, therefore, rests upon this — that we ought to presume a release; but upon what ground are we to presume a release of the heriot? In 1824, upon the death of Richard Baker, no heriot was seized; but it is clear that the land was liable down to that time; and the then Earl of Chichester was only tenant for life. His laches, therefore, affords no ground to presume a release by him, because, being only tenant for life, he could not grant a release. The present earl came into possession in

Chichester v. Hall & another.

1826; the first heriot fell due in 1847, and then he seized; so that there has been no laches on his part. But Mr. Bovill calls in aid the non-payment of any quitrent for forty-five years as a ground for presuming a release of the lord's rights; and there is certainly strong reason to suppose that the quitrent is barred by lapse of time; but it is barred by virtue of the statute, if at all; and why, then, should we, from that fact, presume a release of the heriot, which is not barred by the statute? The same observation applies to the relief, and I think that there is no ground for calling them in aid to raise the presumption which we are asked to make. Neither is there any ground for saying that the tenure of this land is changed. It is freehold land held of the lord, and though the right to a quitrent has been lost by lapse of time, the land is still freehold land held of the lord by such services as remain.

PATTESON, J. I quite concur. The tenure of this land down to the year 1804 is most distinctly proved; and the nature of the tenure will continue unchanged, unless something is shown to have altered it. That may be by acts of the lord and tenant, or by presumption, or by an act of Parliament. This seems to be probably heriot service; and it is said that heriot custom would not be within the Limitation Act. That may be so; but it is unnecessary to decide that point, because, assuming it to be a heriot service, it is impossible that the statute can apply in this case. The 2d and 3d sections cannot be put together so as to make the last receipt of a heriot, which only falls due at long and irregular intervals, the point of time from which the period of limitation begins to run. The twenty years must, I suppose, run from the time when the right to have the heriot accrued; but there are great difficulties in the way of commencing the calculation in this case from the year 1824: the present lord, at that time, had only an estate in remainder; and it is not clear that there was any live animal to be seized. It is said that there ought to be entries on the court rolls, and so there ought; but, supposing that it had not been taken for twenty years, are we to presume that it is gone? I think that, considering the nature of a heriot, no such presumption can be raised. But it is said that that inference is to be drawn from non-payment of the quitrent and relief; it is certainly difficult to say that the quitrent is not barred by the operation of the statute; but, assuming that, I cannot see what ground it affords for presuming that the right to the heriot has been lost independently of the statute.

WIGHTMAN and ERLE, JJ., concurred.

LORD CAMPBELL, C. J., expressed his regret that this relic of Danish invasion should have been allowed so long to remain a reproach to the law of England. He had himself made several ineffectual attempts to induce the legislature to pass some measure for an equitable commutation of copyhold tenure.

Judgment for the plaintiff.

Doe d. Page v. Page.

DOE d. PAGE v. PAGE.¹

Easter Term, May 1, 1851.

Will — Construction of — Word "Business."

A testator devised to his wife "all my land and shop, stock in trade, business, and every thing that I have;" and after his wife's death, he "willed and bequeathed the *business* to his son, for his sole use and benefit; but with an earnest request to do all in his power to assist those of the testator's children who might require it;" and "all the rest of his property which might remain after his wife's death he gave to his executors in trust for his daughter:" —

Held, that the son did not take under the word "business" the land upon which the shop was built, in which the business was carried on.

THIS was an action of ejectment, tried before Erle, J., at the second sittings for Middlesex in Hilary term last, to recover possession of a shop, and the land upon which it was built, from the defendant. The lessor of the plaintiff claimed as residuary devisee in remainder, under the will of John Page, her father, the defendant, Henry Page, as devisee under the same will. The will, so far as is material, was in the following words: "I leave to my wife, Ellen Page, my land and shop, stock in trade, business, and every thing that I have, for her sole use and benefit, with power after my death to dispose of the business, or any part of my property, according as she may think best; then, after my wife's death, I will and bequeath the business to my son, Henry Page, (the defendant,) for his sole use and benefit; but with an earnest request to do all in his power to assist those of my children who are unable to get their own bread; and all the rest of my property which may remain after my wife's death, I give to my executors in trust for my daughter." The daughter was the lessor of the plaintiff. The question was, whether, under the word "business," the defendant, Henry Page, was entitled to the shop and land, in and on which the business was carried on, and for the recovery of which this action was brought. The learned judge directed a verdict for the plaintiff, but reserved to the defendant leave to move to enter the verdict for himself. A rule *nisi* having been accordingly obtained, —

Watson and *Atherton* now showed cause.

H. Hill argued in support of the rule.

LORD CAMPBELL, C. J. It is possible that the testator may have used the word "business" with the intention to include real estate, but that suggestion must be made out by the defendant unequivocally from the context. Now, in the earlier part of the will, the word "business" is used in its general and ordinary acceptation, and is carefully distinguished from the testator's land, shop, or stock in trade. The word is used again, without such clear marks of distinction, in

¹ 17 Law Times, 123.

Biddulph v. Chamberlayne.

the clause which gives the wife a power of disposing of it during her life. But how can it be said to include the house and land in the bequest to the son, when the land and shop had been before distinguished from it as not included in it? It is said that, unless the shop and land were to pass, the testator would not have requested the son Henry to assist the other children; but that would depend upon the value of the business, which the testator may have considered sufficient to enable the defendant to comply with the request.

PATTESON, J. There is no reason for supposing the word "business" to be used in two different senses in the different parts of the will.

WIGHTMAN, J. The testator enumerates the things of which his property consists—land, shop, stock in trade, business, and so on. Then he leaves one specific portion of it, "the business," to his son. That expression has a clear and intelligible meaning, without any reference to real estate.

ERLE, J., concurred.

Rule discharged.

BIDDULPH v. CHAMBERLAYNE.¹

Easter Term, May 8, 1851.

Libel — Plea of Justification — Material Part.

In an action for libel, the declaration set out the whole of a long letter, in which the defendant imputed to the plaintiff improper conduct in various transactions which had taken place in reference to a ditch of the plaintiff's, alleged by the defendant to be a nuisance. The defendant pleaded "as to so much of the libel as related to, and charged the plaintiff with, the keeping of the nuisance," a plea which attempted to justify every sentence contained in the letter. The jury found that the plaintiff kept the ditch as a nuisance, but negatived the improper conduct imputed to the plaintiff in the letter:—

Held that, upon this finding, the plaintiff was entitled to the verdict.

This was an action on the case for a libel upon the plaintiff, published in a newspaper in Hereford. It appeared that the plaintiff and defendant both lived at Ledbury, and had had disputes about the drainage of a ditch and watercourse which ran through some lands occupied by the plaintiff. The defendant wrote a very long letter, which he published in the Hereford newspaper, respecting the nuisance of this ditch, and the proceedings taken against the plaintiff, by complaints, correspondence, informations under the Public Health Act, and the like. The various details respecting these proceedings were interspersed with injurious comments; *e. g.* 1. With reference to some correspondence respecting the matter, "that the plaintiff, after fencing with a particular question for a considerable

¹ 17 Law Times, 124.

Biddulph v. Chamberlayne.

period, abruptly closed the correspondence." The whole of the letter was set out in the declaration as the libel complained of. The defendant pleaded — his 2d plea — as to the composing and publishing, and causing to be composed and published, so much and such parts of the supposed libel as relate to, and charge the plaintiff with, the making, maintaining, keeping, and continuing the nuisances therein mentioned, and as to the causes of action in respect thereof. The plea itself attempted, in detail, to justify every allegation contained in the letter. The plaintiff replied, *de injuria*, upon which issue was joined. There were other pleas, which it is unnecessary to mention.

At the trial, before Patteson, J., at the last assizes for the county of Hereford, the jury found that the ditch was a nuisance, injurious to the health of the inhabitants of the neighborhood, and that it was made, and kept, and continued by the defendant; but they negatived all those parts of the letter which imputed to the defendant improper conduct in the discussions and other proceedings that had taken place respecting it, such as "fencing with the questions put to him," and the like. The learned judge directed a verdict for the plaintiff, but reserved leave to the defendant — who contended that the only material part of the plea was that found by the jury in his favor — to move to enter the verdict for himself.

In the present term, a rule *nisi* was obtained by the defendant for that purpose, or for a new trial, upon the ground of misdirection; against which

Alexander, Greaves, and Barredd now showed cause.

Whately and *Phipson* argued in support of the rule.

[*Rich v. Basterfield*, 4 C. B. 783, and *Reedie v. The London and North-western Railway Company*, 4 Exch. 246, were cited.]

WIGHTMAN, J.¹ The jury have found that the ditch was a nuisance maintained by the plaintiff, and the defendant contends that upon this finding he is entitled to the verdict, all the other allegations in the plea being perfectly immaterial. That depends upon what it is which the plea professes to justify. Now, the introductory part of the plea is somewhat ambiguous. It professes to be confined to "so much and such parts of the libel as relate to, and charge the plaintiff with, the keeping, &c., of the nuisance, and the causes of action in respect thereof." It may be that the mere charge of keeping and continuing the nuisance is not the part of which the plaintiff complained as a libel, but the *mode* of his keeping it, and the conduct imputed to him in respect thereof, and yet all that "relates to" the keeping, &c., of the nuisance, so that the plea may extend to very much beyond the justifying of the mere assertion that the plaintiff kept and maintained a nuisance. Now, did the defendant intend to justify every thing in the libel that, in the extended

¹ LORD CAMPBELL, C. J., had left the court.

Armistead v. White.

sense just mentioned, relates to the keeping of the nuisance? The other allegations in the plea are the best answer to that question, and they contain a justification of every part of the libel. In that view, it seems to me that the defendant cannot have the verdict upon this finding of the jury.

ERLE, J. The rule of law is admitted on both sides, that if a material part of a plea of justification fails, the plea fails altogether. This matter, therefore, depends upon how much the plea professes to justify. The libel alleges a great many applications to the plaintiff to remove the nuisance, and a great many proceedings in respect to it, all which are detailed with disrespectful and injurious observations upon the plaintiff's alleged conduct. I think that all that part of the libel "relates to the continuing of the nuisance;" that the plea, therefore, professes to justify it; and that, upon the finding of the jury, the plaintiff is entitled to the verdict.

PATTON, J. I quite adhere to the opinion which I formed at the trial, that the verdict upon this plea should be entered for the plaintiff. No doubt it is a very tricky plea, and looks as if framed for this very purpose, that it might now be contended that nearly all of it is utterly immaterial, and may be struck out, because of the introductory words "so much of the said libel as relates to, and charges the plaintiff with, the keeping and continuing the nuisances therein mentioned." Now, there are no such words from the beginning to the end of the libel as "making, maintaining, keeping, or continuing the nuisances." That is only the substance to be collected from reading every part of the libel, the very words of which the body of this plea affects to justify. As it is only from reading the whole libel that we can collect what is charged against the plaintiff with respect to these matters, I think the plea must be treated as a plea of justification to the whole libel, and that, therefore, it fails. It would be trifling with common sense to allow the defendant to succeed.

Rule discharged.

ARMISTEAD v. WHITE.¹

Trinity Term, June 5, 1851.

Liability of Innkeeper — Negligence of Plaintiff.

In an action against an innkeeper for the loss of goods, if the jury find that the plaintiff was guilty of gross negligence, the innkeeper is relieved from his liability.

Where the plaintiff had, on the evening of the night in which the theft was committed, and on several previous occasions, opened his driving box, and counted the bank notes kept in it, in the presence of persons in the commercial-room, and the box was so insecurely fastened that it might be opened without a key:—

¹ 15 Jur. 1010.

Armistead v. White.

Held, that the jury were warranted in finding the plaintiff guilty of gross negligence; though it was the custom of travellers to leave their driving boxes in the commercial-room during the night.

CASE on the common liability of an innkeeper, by the custom of the realm, for the loss of money which the plaintiff brought with him to the inn of the defendant.

Pleas, among others, first, not guilty; second, that the defendant was not an innkeeper.

On the trial, before Platt, B., at the Spring assizes at Liverpool, it appeared that the plaintiff was a commercial traveller, who had frequented the defendant's inn for twenty years. On the evening of the night in which money was stolen from the plaintiff's driving box, he had opened the box and counted over the bank notes in the presence of many persons in the commercial-room, as he had also done on several days before, and after replacing them in the box he left it in that room all night, as he had been accustomed to do; it was the custom of travellers to leave their driving boxes in the commercial-room during the night. The box was so insecurely fastened that it might be opened without a key, by pushing back the lock. The learned judge, in summing up the case to the jury, said, that by the custom of England an innkeeper was bound to keep the goods of his guest safely; but that a guest might, by gross negligence, relieve the innkeeper from his liability; and cited *Calye's Case*, 8 Rep. 33, a; and that if they thought that a prudent man would have taken the box with him to his bed-room, or given it into the express custody of the defendant, they might find a verdict for the defendant; and left it as a question for them whether the plaintiff was guilty of gross negligence in the travellers' room, or whether they were satisfied on the evidence that the plaintiff had acted with ordinary caution. The jury found a verdict for the defendant on the first and second issues. In the following Easter term, April 24, —

Wilkins, Serj., obtained a rule *nisi* for a new trial, on the ground of misdirection; ¹ citing 2 Stark. Ev. 561, 3d. ed., and *Kent v. Shuckard*, 2 B. & Ad. 803.

[*Patteson*, J., cited *Richmond v. Smith*, 8 B. & Cr. 9.]

Knowles and *Crompton* now showed cause. The plea of not guilty puts in issue the question whether the plaintiff was guilty of such negligence as would relieve the innkeeper from his liability or responsibility. It is not a proposition of law, that because the plaintiff had not withdrawn the box from the custody of the innkeeper, therefore he was not guilty of negligence. This is not the case of the loss of a parcel, where it has been left with other ordinary parcels in a room; but it was a peculiar parcel, left in the commercial-room under such circumstances that the plaintiff contributed to his own loss. Sup-

¹ The rule was also granted on the ground of the verdict on the second issue being against the evidence, but after argument the court said that they could not say that the jury were wrong.

Armistead v. White.

pose a traveller shows what money he has in his purse, and leaves it upon the table in the commercial-room, would the innkeeper be liable?

J. Henderson, contra. The test presented to the jury was not the correct one, though I do not say that consideration of it ought to have been excluded. The judge led the jury to think that the plaintiff ought to have taken the box to his bed-room.

LORD CAMPBELL, C. J. I am of opinion that the rule should be discharged. If the judge had intimated that it was the duty of the plaintiff to withdraw the box from the commercial-room, and carry it with him into his bed-chamber, and that, not having done so, he had lost his claim upon the defendant, that would have been a misdirection. But there is no misdirection in what he has reported to us. It must be taken that he left the question to the jury under all the circumstances of the case; and it is not possible to say, as a matter of law, that a traveller might not be guilty of negligence, under some circumstances, in leaving a box containing money in the commercial-room; and in this case I think that there was strong evidence from which the jury were justified in finding that the plaintiff was guilty of gross negligence. *Prima facie*, the innkeeper is liable for the loss of goods left in the travellers' room; though in *Burgess v. Clements*, 4 Mau. & S. 306, it was held to be negligence in the guest to take a box of goods into his bed-room. Indeed, it is questionable whether the direction was not too favorable for the plaintiff, because it is doubtful whether, in order to relieve the innkeeper from his liability, there must be *crassa negligentia* in the guest.

PATTESON, J. If what the judge said was a legal exposition of what, in law, is gross negligence, it would have amounted to misdirection; but there were other circumstances, such as the state of the box, from which it might be properly left to the jury to consider whether there was not gross negligence. In *Richmond v. Smith*, 8 B. & Cr. 9, one of the plaintiff's packages was left in the commercial-room after a conference with the innkeeper, and his assent to it.

COLERIDGE and ERLE, JJ., concurred.

Rule discharged.

Regina v. Parkinson. — Regina v. Caudwell.

REGINA v. PARKINSON. — REGINA v. CAUDWELL.¹

Michaelmas Term, November 4 and 6, 1851.

Practice — Motion for a New Trial in a Criminal Case — Presence of Defendant in Court.

Where a defendant has been found guilty upon an indictment for an offence which does not subject him to corporal punishment, it is not necessary that he should be present in court in order to move for a new trial.

Where defendant had been found guilty upon an indictment for perjury, and sentenced to transportation, but he was not in custody under the sentence, a motion for a new trial cannot be made unless he is present in court.

Semle, by Lord Campbell, C. J., that where several defendants have been convicted upon an indictment, it is not necessary that all should be present in court in order to move for a new trial on behalf of one or more of them.

INDICTMENT for an obstruction to a public sewer. On the trial, before Williams, J., at the Summer assizes at Lancaster, the defendant was found guilty, leave being reserved to move to enter a verdict for the defendant. In this term, November 4, —

Watson moved accordingly, or for a new trial.

LORD CAMPBELL, C. J., asked whether the defendant was in court.

Watson. This is not a case in which the defendant is subject to personal punishment, and, therefore, it is not necessary that he should be present in court.

LORD CAMPBELL, C. J., assented.

PATTESON and WIGHTMAN, JJ., concurred.

The court took time to consider, and on a subsequent day (November 12) granted a rule *nisi*.

REGINA v. CAUDWELL

INDICTMENT for perjury. On the trial before Erle, J., at the Summer assizes for Berkshire, the defendant was found guilty, and was sentenced to transportation for seven years. In this term, November 6, —

Pigott was about to move for a new trial, the defendant not being in court.

LORD CAMPBELL, C. J., asked whether the defendant was in custody under the sentence.

¹ 15 Jur. 1011.

 Levinson v. Syer.

Pigott. He is not; it has not been decided to be necessary since stat. 11 Geo. 4, and 1 Will. 4, c. 70, the 9th section of which empowers the judge to pronounce sentence at the trial. In *Rex v. De Berenger & others*, 3 Mau. & S. 67, 69, a motion was made for arresting the judgment, though two of the defendants did not appear to receive judgment.

LORD CAMPBELL, C. J. I have always thought that it is a hardship not to allow one of several defendants, who have been found guilty upon an indictment, to move for a new trial, unless all the defendants are present in court. See *Rex v. Teal*, 11 East, 307. *Rex v. Askew*, 3 Mau. & S. 9. *Rex v. Lord Cochrane*, Id. 10, note *a*. But no hardship arises from that rule when there is only one defendant; and this is a case in which peculiarly the defendant ought to be in court, because sentence has been passed upon him, which he has hitherto evaded; and he shall not make the experiment of trying to get a new trial without subjecting himself to being taken for the purpose of enforcing the sentence if the court should refuse the rule.

[*Pigott.* No warrant having been issued for committing the defendant in execution, he has not evaded the sentence.]

When he does appear, you may renew your application.

PATTESON and ERLE, JJ.,¹ concurred.

 LEVINSON v. SYER.²

Bail Court, Michaelmas Term, November 11, 1851.

Warrant of Attorney — Attesting Witness — 1 & 2 Vict. c. 110, s. 9.

A warrant of attorney, prepared by a law stationer, according to the instructions of the defendant himself, was attested by an attorney introduced to the defendant by the plaintiff. The defendant had written and signed an authority to the attorney to act as his attorney on the signing and executing the warrant. The attorney was named in the warrant as having authority to enter up judgment thereon, and had subsequently done so, and issued execution upon the judgment:—

Held, that the attestation was good.

HAWKINS moved for a rule calling upon the plaintiff to show cause why the judgment signed, and execution issued on a warrant of attorney, should not be set aside, and the defendant discharged out of the custody of the sheriff of Surrey as to this action, and why the warrant of attorney should not be delivered up to be cancelled. It appeared from the affidavits that the defendant was now in the custody of the sheriff of Surrey, under a writ of *capias ad satisfaciendum*

¹ WIGHTMAN, J., was absent on account of indisposition.

² 15 Jur. 1011.

Levinson v. Syer.

issued in this action upon a judgment signed upon a warrant of attorney given by the defendant to the plaintiff to secure payment of 35l. The warrant of attorney had been prepared by a law stationer at the request of the defendant, and in accordance with the terms previously arranged upon by the plaintiff and the defendant. The defendant, accompanied by a friend, had gone with the plaintiff to the office of an attorney, who resided in the same house with the plaintiff; the latter, addressing the attorney, said, "This (alluding to the defendant) is Mr. Syer, and this (holding a sheet of writing paper in his hand) is a warrant of attorney given for goods bought, &c.; you will act as Mr. Syer's solicitor in this proceeding." The attorney had then requested the defendant to authorize him, in writing, to act as his attorney in the execution of the warrant. The defendant had accordingly written and signed an authority, and the warrant was then attested in the usual form. The name of the attorney was inserted in the warrant, with two others, as attorneys authorized to enter up judgment upon that instrument, and he had subsequently entered up judgment and issued execution upon it. It was now contended that the execution of the warrant of attorney was not duly attested, according to the requirements of the stat. 1 & 2 Vict. c. 110, s. 9. It was essential that the attorney who witnessed the execution should not only be named by the defendant, and authorized by him to act as his attorney, but also that he should not be the attorney for the plaintiff. Here the attorney lived in the same house with the plaintiff, and was introduced by him to the defendant in terms which could leave no doubt but that the subject had been previously mentioned by the plaintiff, and that he was at that time the plaintiff's attorney.

[*Erle, J.* The defendant had previously agreed on the terms of the warrant, and had himself given instructions to a law stationer to prepare it. He seems to have had a full knowledge of his own rights.]

Although he might have been perfectly acquainted with his own rights, yet he ought to have had a separate attorney acting for him. *Sanderson v. Westley*, 6 M. & W. 98. *Prior v. Swaine*, 2 Dowl. & L. 37. It was impossible to prove whether or not, at the time of the execution of the warrant, the attesting witness was, in fact, the attorney for the plaintiff; but it must be inferred from all the facts surrounding the execution, as well as from the circumstance that he was the person who afterwards actually entered up judgment and issued execution upon the warrant. There was, at all events, quite sufficient disclosed in the affidavits to call upon the plaintiff for an answer, the facts being more within his knowledge than the defendant's. Another objection is, that the attesting witness was one of the parties named in the warrant of attorney as having authority to enter up judgment upon it.

[*Erle, J.* These instruments authorize every attorney of the court to enter up judgment; if your objection is good, no valid warrant of attorney can be made.]

The point had never before been raised; it would be a dangerous

Doe d. Palmer v. Eyre. — Doe d. Badeley v. Massey.

thing to allow an attorney to act under the authority of an instrument which he himself had attested. There ought to be an exception in the case of an attesting witness.

ERLE, J. I see no ground for granting a rule *nisi* in this case. Here is a security prepared by the defendant himself, and given for a good consideration; and there is no allegation whatever put forward by the defendant that he has not had, substantially, all his rights according to law, but he is now endeavoring to take advantage of a matter not having any effect upon those rights, viz., whether the attesting witness to this warrant of attorney may not also have been the attorney of the plaintiff. There was, however, no statement in the affidavits that the attesting witness for the defendant had previously been, or at the time was, the attorney of the plaintiff. It is said that they lived in the same house; but a person may live in the same house with an attorney without retaining him as such. The fact of the attorney afterwards issuing execution does not raise a necessary presumption that he was the attorney of the plaintiff at the time of the execution of the warrant. Again: it is said that he was introduced by the plaintiff to the defendant; but there are a great number of cases which show that where, upon the execution of a warrant of attorney, a plaintiff does introduce an attorney, and the defendant, with a full knowledge of his own rights, adopts him, the execution is valid. So here, the attorney, being introduced, says to the defendant, "Will you retain me as your attorney?" And he, with a full knowledge of the law, signs a paper authorizing him to act as such, and gives a warrant of attorney, which he now seeks to set aside the moment it is sought to be enforced against him. There is nothing that I can see to raise the presumption that the attesting witness was the attorney for the plaintiff; and the first ground of objection fails. Then it is said that a warrant of attorney is void if the attesting witness is also authorized to enter up judgment upon it; but there is no authority for that, and I can see no ground for interfering.

Rule refused.

DOE d. PALMER v. EYRE. — DOE d. BADELEY v. MASSEY.¹

Trinity Term, June 13, 1851.

Statute of Limitations — Ejectment — Person claiming under Mortgage — User.

In 1823, J. E., being seized in fee of a house, mortgaged it for a term of five hundred years, of which the lessor of the plaintiff was the assignee, and the mortgagor had paid him interest until recently before the commencement of the action. J. E. had become entitled upon the death of his mother, who resided in the house until her death in 1821. Defendant, the sister of J. E., had resided with her, and continued in possession of the house after her death, and without payment of rent or acknowledgment of title:—

¹ 15 Jur. 1031.

Doe d. Palmer v. Eyre.

Held, that an action by J. E. would be barred by stat. 3 & 4 Will. 4, c. 27; but that the right of the lessor of the plaintiff to bring ejectment was preserved by stat. 7 Will. 4, and 1 Vict. c. 28.

In 1821, N., being seized in fee of land, leased it to W. In 1822, W. mortgaged it for a term of years. In 1834, the mortgage was paid off, and the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claimed:—

Held, that the lessor of the plaintiff was a person claiming under a mortgage within stat. 7 Will. 4, and 1 Vict. c. 28, and, therefore, might bring ejectment within twenty years after the mortgage was paid off, though after the expiration of twenty years from the payment of rent to the mortgagor, or acknowledgment of title in him by the tenant in possession.

In 1829, W. leased land to defendant for twenty-one years. Defendant applied to W. for leave to take in a piece of ground adjoining, but W. declined to give such leave, stating that other persons, to whom he had sold adjoining houses, had a right of way over it. Defendant, notwithstanding, enclosed and occupied it for twenty years, without payment of rent or acknowledgment of title:—

Held, that the piece of ground could not be considered as having been occupied by defendant as part of the demised premises in respect of which rent was paid, and, therefore, an action by W. would be barred by stat. 3 & 4 Will. 4, c. 27.

DOE d. PALMER v. EYRE.

EJECTMENT for a house. On the trial, before Cresswell, J., at the Spring assizes at York, it appeared that John Eyre, being seized in fee of the house in question, made his will, and devised it to the mother of the defendant for life, with reversion to his son, John Eyre. The defendant lived with her mother in the house until her death in 1821, and remained in possession afterwards, and until the present time, without payment of rent or acknowledgment of title in any person. John Eyre, the devisee in reversion, was never in possession, but in 1823 mortgaged the house to Sarah Elliott for a term of five hundred years, under whom the lessor of the plaintiff claimed. The interest upon the mortgage money was regularly paid by the mortgagor until within two or three years before the action was brought, but not with the knowledge or assent of the defendant, who was no party to the mortgage. Default being then made in the payment of interest, and the principal money remaining unpaid, the lessor of the plaintiff demanded possession from the defendant, and, upon her refusal to give up possession, brought this action. The learned judge directed a verdict to be entered for the defendant, reserving leave to move to enter a verdict for the lessor of the plaintiff. In the following Easter term, (April 16,) a rule *nisi* accordingly was obtained; against which, in this term,¹—

Watson and *R. Hall* showed cause. The question is, whether the lessor of the plaintiff is not barred by the 2d and 3d sections of stat. 3 & 4 Will. 4, c. 27, the act for the limitation of actions and suits relating to real property, and the supplemental act, 7 Will. 4, and 1 Vict. c. 28. The 3d section of stat. 3 & 4 Will. 4, c. 27, defines when the right to make an entry or bring an action shall be deemed to have accrued, but contains no provision for the case of a mort-

¹ May 30, before LORD CAMPBELL, C. J., PATTERSON, COLERIDGE, and ERLE, JJ.

Doe d. Palmer v. Eyre.

gage. But the question arose in *Doe d. Jones v. Williams*, 5 Ad. & El. 291, where Patteson, J., said, (pp. 296, 297,) "From the language of the 15th section, it plainly appears that something or other was, after the act passed, to be considered as adverse possession, which was not so before the act passed. . . . How far, under the 3d section, it is necessary for the mortgagee to bring his action within twenty years from the day of default, I cannot say: I do not see my way at all."

[*Lord Campbell*, C. J. Stat. 7 Will. 4, and 1 Vict. c. 28, was passed at the suggestion of Littledale, J., and the cause of passing it was the apprehension that the right of entry of mortgagees might be held to accrue at the end of the year, when the mortgaged premises were forfeited, by non-payment of the principal money, though interest was paid subsequently; it may, however, meet other cases.]

That statute was intended to be confined to cases between mortgagor and mortgagee, when the mortgagor was in possession. It is to be read as part of stat. 3 & 4 Will. 4, c. 27. Sir E. Sugden, C., in *Wrixon v. Vize*, 3 Dru. & W. 104.

[*Lord Campbell*, C. J. In that case, Sir E. Sugden had not in contemplation the case of a mortgagor out of possession.]

The fact of payment of interest existed in *Doe d. Goody v. Carter*, 9 Q. B. 863; 11 Jur. 285; and in *Doe d. Carter v. Barnard*, 13 Jur. 915; but this statute was not adverted to. The statute was not intended to aid a person who had been sleeping over his rights.

[*Lord Campbell*, C. J. The mortgagee has been receiving interest, and, therefore, has not been asleep.]

The construction contended for on the other side will place the mortgagee in a better situation than persons under a disability; and it will not only give to the mortgagee a right which the mortgagor had not, but will enable the mortgagor to use the name of the mortgagee to bring an action, which he would be barred from bringing in his own name. There can be no doubt that the action is barred by stat. 3 & 4 Will. 4, c. 27. By sect. 13, the *possessio fratris* or *sororis* is abolished.

[*Lord Campbell*, C. J. Not retrospectively.]

Then there was no tenancy between the mortgagor and the defendant — she came in by intrusion; but if the possession was not adverse, by sect. 15, the action should have been brought within five years next after the passing of the act. The proviso at the end of sect. 7, by which mortgagors and *cestuis que trust* are put upon the same footing, was intended to prevent the difficulty created by sect. 3, on account of the anomalous position of a mortgagor in possession. [They cited *Garrard v. Tuck*, 8 C. B. 231, 250, 252; 13 Jur. 871, 873.] But no question could be raised on that statute in this case, because the defendant was in possession at the time of the mortgage, and was never a wrong-doer as against the mortgagee.

Knowles and *Unthank*, contra. *Doe d. Jones v. Williams*, 5 Ad. & El. 291, has no application since stat. 7 Will. 4, and 1 Vict. c. 28; but it shows that, before that statute, Patteson, J., doubted whether sect.

Doe d. Palmer v. Eyre.

2 and 3 of stat. 3 & 4 Will. 4, c. 27, applied to the case of mortgagor and mortgagee. *Doe d. Goody v. Carter*, 9 Q. B. 863; 11 Jur. 285, also has no application, because it did not appear that there had been any payment of interest to the mortgagee within twenty years; if there had been, stat. 7 Will. 4, and 1 Vict. c. 28, would have applied, and, therefore, it was not referred to. The title of the lessor of the plaintiff accrued in 1821, when the defendant was in possession by leave of the mortgagor; and even if the court were to assume that she was an intruder, and entered before her brother, her possession was the *possessio sororis*, and, therefore, at the passing of stat. 2 & 3 Will. 4, c. 27, there was no adverse possession.

[*Lord Campbell*, C. J. There was clearly no adverse possession under the old law; but by sects. 2 and 3 of stat. 3 & 4 Will. 4, c. 27, the entry must be made, or action brought, within twenty years after the right accrued.]

Then the case comes within the words of stat. 7 Will. 4, and 1 Vict. c. 28, by which a mortgagee may make an entry or bring an action within twenty years next after the last payment of any part of the principal money or interest; and there is nothing to show that the enactment is confined to actions by the mortgagee against the mortgagor, or to cases in which the mortgagor is in possession. When the mortgagor is not in possession, the mortgagee has no means of knowing whether the tenant pays rent to the mortgagor or not; and, therefore, if the object of the statute was to give security to the mortgagee, the construction we contend for must be adopted; otherwise, if a mortgagor mortgaged his land, a person having been in possession as tenant at will for nineteen years, without payment of rent, the title of the tenant at will would be complete in one year, and the mortgagee would lose his money. The statute in effect abolishes the Statutes of Limitation as against mortgagees, and leaves them as they were before stat. 21 Jac. 1, c. 16, s. 1.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court. We are of opinion that, in this case, the verdict ought to be entered for the lessor of the plaintiff.

Looking only to stat. 3 & 4 Will. 4, c. 27, the action is barred, for it was not commenced within twenty years next after the time at which the right to bring such action first accrued to the lessor of the plaintiff, or to any person through whom he claims. The facts, that the defendant was the sister of John Eyre, and that she held with his consent, are now immaterial, the possession of a relation of the person entitled being no longer deemed the possession of the heir, and lapse of time for the requisite period, without payment of rent or written acknowledgment, giving a title, irrespective of any consideration whether the possession was adverse. The defendant, having been tenant at will to her brother, had been in possession more than twenty-one years from the time of her entry, without payment of rent or any written acknowledgment; and under stat. 3 & 4 Will. 4, c. 27, the fee would have vested in her. *Doe d. Goody v. Carter*, 9 Q. B. 863; 11 Jur. 285.

Doe d. Palmer v. Eyre.

But we must look to the stat. 7 Will. 4, and 1 Vict. c. 28, upon which a court of law is now for the first time called upon to put a construction. In the year 1823, John Eyre, being seized in fee of the house in question, mortgaged it for a term of five hundred years. The lessor of the plaintiff is now the assignee of the mortgage, and the mortgagor had paid him interest on the mortgage till recently before the commencement of this action. His counsel contended, therefore, that his right of recovery is the same as if stat. 3 & 4 Will. 4, c. 27, had never passed; in which case, there having been no adverse possession, the action would clearly have been maintainable.

The statute relied upon, after reciting that doubts had been entertained as to the effect of the former statute, "so far as the same relates to mortgages," enacts, "That it shall be lawful for any person, *entitled to, or claiming under, any mortgage* of land, to bring an action to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to bring such action shall have accrued." This language, in its natural and grammatical sense, applies to the present case. The lessor of the plaintiff is entitled to, and claims under, a mortgage of the house, to recover which the action is brought; and he has brought his action within twenty years next after the last payment of interest secured by such mortgage, although more than twenty years had elapsed since the time at which the right to bring the action had first accrued.

The defendant's counsel contended that the enactment must be confined to the case where the mortgagor has himself been and continued in possession of the mortgaged premises, or might himself maintain an ejectment against a tenant in possession; and we are told that its object was to remove a doubt whether, where the mortgagor had been allowed to remain in possession more than twenty years after the forfeiture of the mortgage, by default in repaying the mortgage money, although the interest on the mortgage continued to be regularly paid, the mortgagee could maintain an ejectment against the mortgagor or his tenants. But we must learn the object of the legislature from the language of the statute, and it clearly appears to have been to make mortgages an available security where they were good and valid in their inception; and the mortgagee, having received payment of his interest, cannot be charged with any laches. This object would be effectually defeated if we were to adopt the limited construction proposed by interpolating the words necessary for that purpose. In the vast majority of mortgages in England, the mortgagor is not in the actual possession of the mortgaged lands when the mortgage is executed, and they afterwards remain in the possession of his tenants. The mortgagee and those who advise him are perfectly satisfied if, upon reference to a conveyancer, the title to the premises to be mortgaged is pronounced good, and, upon a reference to a surveyor, the value is found to be sufficient. If the mortgagee receives regular payment of his interest under the mortgage, he never inquires, and he would not be allowed to inquire, whether rent is

Doe d. Palmer v. Eyre.

regularly paid by the tenants to the mortgagor. The mortgagor, therefore, according to the defendant's construction of the statute, by omitting to receive rent for twenty years, or to obtain a written acknowledgment from a tenant, may place the mortgagee in the position of suddenly finding, that, for the repayment of the mortgage money, he must look only to the personal credit of an insolvent.

On the other hand it is said, that although there may be little sympathy for a person who, like the defendant, ungratefully and fraudulently seeks to turn long-continued kindness into the means of robbing a benefactor, we must regard the hardship which may be thrown upon a purchaser for value who, for twenty years, has been in undisputed possession of the estate. But a purchaser can only be affected by mortgages executed prior to his purchase. In a register county he must have full notice of a prior mortgage, or it is void as against him; and even without the benefit of a register, there must have been negligence on his part, if an existing mortgage is not discovered.

It was argued before us, that the owner of an estate, who is himself barred by a tenant having occupied twenty years without payment of rent or acknowledgment, might, by executing a mortgage, and payment of interest to a mortgagee, vest in the latter a right of entry which he could not exercise himself; but by such a mortgage, nothing would pass under the 34th section of stat. 3 & 4 Will. 4, c. 27, the right of the owner being extinguished at the end of the period of limitation.

A case may be put where a person who has occupied as tenant by sufferance nearly twenty years, without payment of rent or written acknowledgment, might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises, and going on for a great many years afterwards paying interest to the mortgagee. But it cannot be considered to have been an object of the legislature to protect the interest of such a person. The mortgagor certainly may, in some cases, gain a consequential advantage by our construction of the statute, although it was passed for the security of mortgagees. Still, without this, the security intended to be given to mortgagees cannot be enjoyed.

Seeing no inconvenient consequences which would follow from supposing that the words of the legislature were used in their natural and grammatical sense, we think that we are not at liberty to put any forced or limited construction upon them, and, therefore, that the lessor of the plaintiff is entitled to our judgment.

Rule absolute.

Doe d. Badeley v. Massey.

DOE d. BADELEY v. MASSEY.

Trinity Term, June 13, 1851.

EJECTMENT to recover a piece of land in Middlesex, upon which a stable and workshop had been built by the defendant.

On the trial, before Coleridge, J., at the sittings at Westminster, during last Easter term, it appeared that, in 1821, the Marquis of Northampton, who was seized in fee, granted a lease of land for building to Benjamin Goodwin, for ninety-nine years. On the 1st of May, 1822, Benjamin Goodwin granted a lease of a large plot of ground, part of that land, and including the piece of land for which the action was brought, to John Wilson, for ninety-four years. On the 31st of July, in the same year, John Wilson mortgaged the ground to Benjamin Goodwin, as security for the sum of 3000*l*. By indenture, dated the 26th of May, 1829, between Benjamin Goodwin, John Wilson, and Marjoribanks and others, the mortgage term was assigned to Marjoribanks and others, to secure a loan of 6000*l*. By deed, dated the 30th of June, 1829, John Wilson assigned to Robert Child, to hold subject to the mortgage term. In 1834, the mortgages were paid off, and there was a reconveyance of the land; and the mortgagees and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claimed. In 1822, Robert Wilson, who was entitled to a large piece of ground under a lease from the Marquis of Northampton, built four houses upon the land, which were numbered 9, 10, 11, and 12, with gardens behind them: the gardens of Nos. 9 and 10 were separated by a wall from the piece of land for which the action was brought, which was set out as a public way to the coach-houses to be attached to the houses adjoining when built. On the 26th of May, 1829, Robert Wilson leased to the defendant a piece of ground, adjoining to that in question, for twenty-one years, at a yearly rent of 3*l*. At that time, the piece of ground in question was used as a public way to the coach-houses attached to the adjoining houses. Robert Wilson, who was called as a witness for the lessor of the plaintiff, stated that the defendant applied to him to grant him a lease of more ground; that he told him he had sold Nos. 9 and 10, and that the parties to whom he had sold had a right of way over the piece of land in question; but if he liked to take it in, and build upon it, he must do it at his own peril; he must not think that he countenanced it; and that he should not interfere. The defendant, in 1829, enclosed the strip of land in question, and built upon it, so as to leave no passage to No. 10, and continued to occupy it for twenty years, without paying any additional rent, or any acknowledgment in respect of it. The defendant, at the expiration of his lease, refused to give up the piece of land and buildings in question. It was contended for the lessor of the plaintiff, first, that the encroachment made by the defendant was for the benefit of his landlord, and, therefore, that the action was not barred by sect. 2 of stat. 3 & 4 Will. 4, c. 27; and, secondly, that the lessor of the plaintiff claimed under the mortgage, and, therefore, his

Doe d. Badeley v. Massey.

right of action was preserved by stat. 7 Will. 4, and 1 Vict. c. 28. The learned judge was of opinion that the piece of ground in question could not be considered as part of the demised premises in respect of which rent was paid by the defendant, and, therefore, stat. 3 & 4 Will. 4, c. 27, would bar the action; but that the right of the lessor of the plaintiff was preserved by stat. 7 Will. 4, and 1 Vict. c. 28. And there-upon a verdict was entered for the lessor of the plaintiff, leave being reserved to move to enter a verdict for the defendant, or a nonsuit. In the same term, (April 28,) —

Montagu Chambers obtained a rule *nisi* accordingly; against which, in this term,¹ —

Knowles and *Hawkins* showed cause. First, *prima facie* the law presumes that every enclosure made by a tenant adjoining the demised premises was made by him for the benefit of his landlord. Lord Abinger, C. B., in *Doe d. Harrison v. Murrell*, 8 Car. & P. 134. Coleridge, J., in *Doe d. The Earl of Dunraven v. Williams*, 7 Car. & P. 332. The piece of land enclosed by the defendant became part of the demised premises, and, therefore, was not held by the defendant for twenty years without payment of rent or acknowledgment, within sects. 2 and 3 of stat. 3 & 4 Will. 4, c. 27. In *Bryan d. Child v. Winwood*, 1 Taunt. 208, Graham, B., stated the presumption to be, that the enclosure was taken in with the consent of the lessor, in right of the demised premises, for the benefit of the lessor after the end of the lease, with this qualification, "especially if the soil of the waste was the property of the plaintiff's lessor." But there is no distinction between an encroachment upon the lessor, as where the lessor is also lord of the waste encroached upon, and an encroachment upon a stranger. *Doe d. Lloyd v. Jones*, 15 M. & W. 580. In *Doe d. Lewis v. Rees*, 6 Car. & P. 610, Parke, B., said, "It is clearly settled that the encroachment must be taken to be for the benefit of the lessor, unless it be clearly shown that the lessee did not intend to hold that part of the lessor as well as the rest."

[*Lord Campbell*, C. J. The legal principle on which those cases ought to be considered as resting is, that the lessee is estopped from saying that it is his own property; it would be a strange principle that he should be considered as stealing for the benefit of his landlord; *a fortiori* he is estopped where the land encroached upon belongs to his landlord.]

There is nothing in this case to rebut the presumption that the defendant took in the land for the benefit of his landlord.

[*Lord Campbell*, C. J. He cannot transfer it to his landlord, as against a third person, though the right of entry may be barred.]

It will be said that the conduct of the defendant shows that he enclosed for the benefit of his landlord, and not for his own benefit; but he cannot now say that it is his own: it is part of the waste, and he

¹ June 7, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

Doe d. Badeley v. Massey.

ought to have given it up with the remainder of the estate leased to him.

[*Lord Campbell*, C. J. There is a difficulty in saying that the encroachment was held as part of the demised premises; the circumstance of the defendant asking for leave to take in the piece of land negatives the intention that it should be held as part of the demised premises, though there was no adverse possession of it before stat. 3 & 4 Will. 4, c. 27.]

In this case, the encroachment would be for the benefit of the mortgagee, because, the lease being subsequent to the mortgage, the mortgagee might have treated the lessee as a trespasser, and ejected him, or he might have required the lessee to pay the rent to him; and if he did so, then the relation of landlord and tenant would subsist between them, though no lease was granted; the defendant was tenant at sufferance until notice to quit was given him by his landlord.

Secondly, the right of the mortgagee is kept alive by stat. 7 Will. 4, and 1 Vict. c. 28. Whatever right of entry the mortgagee had has passed to the lessor of the plaintiff; the defendant has no other title except that derived under the mortgage. Wilson had no title to give the defendant; his interest was vested in Marjoribanks, who had the legal title for the remainder of the term granted to Goodwin. Wilson only assented to the assignment by Marjoribanks. This case shows how easily the rights of the mortgagee may be defeated by collusion between the mortgagor and his lessee, unless they are protected by stat. 7 Will. 4, and 1 Vict. c. 28.

Montagu Chambers and *J. H. Henderson*, contra. First, if the defendant can be considered as tenant at will, there has been no demand of possession, and, therefore, ejectment will not lie. But the encroachment in this case was not for the benefit of the landlord, because he repudiated having given permission to the defendant to enclose and build for his benefit. In *Doe d. Lloyd v. Jones*, 15 M. & W. 580, 584, when *Doe d. Colclough v. Mulliner*, 1 Esp. 460, was cited, in which Lord Kenyon is reported to have revolted at the idea that the tenant could make his landlord a trespasser, which he said would unavoidably be the case if the latter could recover in ejectment, Alderson, B., said, "The answer to that is, that the presumption may be rebutted by the repudiation of the landlord as well as by the acts of the tenant."

[*Patteson*, J. In *Doe d. Colclough v. Mulliner*, Lord Kenyon was commenting upon the tenant taking something belonging to a third person, not to the landlord.]

In this case, the tenant took land over which a privilege had been granted by the owner of it to another. It is the same as with reference to the waste of the lord of the manor. Here the mortgagee is a third person. In all the cases cited, although there was nothing to repudiate the inference, it was put as a matter of fact to the jury. Here the ruling of the learned judge was submitted to. In *Doe d. Harrison v. Murrell*, 8 Car. & P. 134, there was a verdict for the defendant.

Doe d. Badeley v. Massey.

[*Lord Campbell*, C. J. You need not trouble yourself further upon that point, because we all think that the learned judge at the trial was right in holding that this piece of land, which was taken in by the tenant, was not part of the demised premises, so as to prevent the operation of stat. 3 & 4 Will. 4, c. 27. Unless it could be considered as part of the demised premises, so that rent issued out of it, there was no payment of rent, or acknowledgment in respect of it.]

Secondly, stat. 7 Will. 4, and 1 Vict. c. 28, does not apply, because the lessor of the plaintiff does not claim under the mortgage, but under the original lease granted by the Marquis of Northampton, the owner of the fee.

[*Lord Campbell*, C. J. The mortgagees had the legal estate in them. Was it not conveyed to the lessor of the plaintiff? and does he not claim under the mortgage?]

The mortgage having ceased to exist, and having been destroyed by the conveyance of the equity of redemption, the title of the defendant is derived from the owner of the fee.

[*Lord Campbell*, C. J. We must look to the legal title; a purchaser might claim under the mortgage.]

The legal title would be proved without producing more than the assignment of the legal estate; the production of the mortgage deed would be unnecessary. Further, stat. 7 Will. 4, and 1 Vict. c. 28, applies only where there is a subsisting mortgage at the time when the action is brought. The words of the statute are confined to such cases; it recites that doubts had been entertained as to the effect of stat. 3 & 4 Will. 4, c. 27, "so far as the same relates to mortgages." This mortgage was existing nineteen years before, and the purchaser is bound to inquire whether there had been any outstanding term.

[*Erle*, J. It is difficult to understand why a mortgagee, who has only partly been paid off, should be protected, and a purchaser from a mortgagee not be protected.]

The parties stand in a relation towards each other which would result in a perfect title. It will follow from the construction of the statute contended for on the other side, that where a man has been in possession for eighteen years, without payment of rent or acknowledgment of title, and the owner makes a mortgage in that year, and pays it off in the subsequent year, he will have another twenty years in which to bring an action. Stat. 7 Will. 4, and 1 Vict. c. 28, ought to be confined to the protection of the mortgagor. When the mortgage has been paid off, the statute is satisfied, and the case is governed by stat. 3 & 4 Will. 4, c. 27.

[*Erle*, J. Then the assignee of the mortgage has twenty years in which to bring an action; but if he takes the equity of redemption, he has no title.]

He is then in the position of a stranger who purchases.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court.

Regina v. Aldham and the United Parishes Insurance Society.

This case likewise depends upon the construction of stat. 7 Will. 4, and 1 Vict. c. 28.

During the argument, we overruled the point made on behalf of the lessor of the plaintiff, that the bit of ground for which the ejectment was brought must be considered as having been occupied by him as part of the demised premises in respect of which rent was paid, for the conduct of both parties clearly shows the contrary; so that, as against Wilson, or any one claiming under him, other than a mortgagee, lapse of time would be a bar.

The real question here is, whether the lessor of the plaintiff can be considered "entitled to, or claiming under, a mortgage." He is not a mortgagee, nor the assignee of a subsisting mortgage; the mortgage which Wilson had created in 1822 was paid off in 1834, when the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claims. Although he is not entitled to the mortgage, we think that he *claims under the mortgage*.

In no other way can the statute be made effectual for the protection of mortgagees. According to the construction we put upon it in *Doe d. Massey v. Eyre*, the mortgagee might have maintained an ejectment after the expiration of the twenty years, or he might have transferred this right of action, by assigning to another who paid him off. But suppose that the mortgage deed contains a power of sale, may the mortgagee not transfer the same right to a purchaser? Is the purchaser barred by the lapse of time? and may he recover back the purchase money which went in satisfaction of the mortgage? If so, the mortgagee, who has regularly received payment of his interest, may entirely lose his principal, from the mortgagor having omitted to receive rent, or an acknowledgment from the tenant for twenty years. On payment of the mortgage money, the mortgage ceases to exist as a security for money; but the person to whom the mortgagee conveys his legal interest *claims under the mortgage*, although the equity of redemption should likewise be conveyed to him.

We are, therefore, of opinion that the lessor of the plaintiff is entitled to our judgment, and that the rule to enter the verdict for the defendant must be discharged.

Rule discharged.

REGINA v. ALDHAM AND THE UNITED PARISHES INSURANCE SOCIETY.¹

Michaelmas Term, November 10, 1851.

Friendly Society — Notice of Meeting — Requisition upon Officers.

The officers of a friendly society are bound, under sect. 9 of stat. 10 Geo. 4, c. 56, to sign a notice to convene a general meeting of its members, upon a requisition for that purpose being duly made to them. (Erle, J., dissenting.)

¹ 15 Jur. 1035.

Regina v. Aldham and the United Parishes Insurance Society.

IN Trinity term,¹—

Hawkins moved for a rule calling upon the president, secretary, or other principal officer of the Aldham and United Parishes Insurance Society to show cause why a *mandamus* should not issue, commanding them, or one of them, to sign a public notice to convene a general meeting of its members, for the purpose of taking into consideration the propriety of rescinding or altering the rules of the society. It appeared from the affidavit in support of the motion that the society was established in 1826, and its rules were duly enrolled and certified. A requisition had been duly agreed to and signed at a meeting of upwards of two hundred members of the society, calling upon the president, vice presidents, and secretary of the society to convene a meeting. The requisition had been delivered to them, and they had declined to sign it. This motion is made after a similar rule has been refused by Erle, J., in the Bail Court. See *Reg. v. Bannatyne & others*, 2 Lownd. M. & P. 213; 4 Eng. Rep. 188. By sect. 9 of stat. 10 Geo. 4, c. 56, no rule, confirmed by the justices of the peace in manner aforesaid, shall be altered, rescinded, or repealed, unless at a general meeting of the members of such society convened by public notice signed by the secretary, or president, or other principal officer or clerk of such society, in pursuance of a requisition for that purpose by seven or more of the members of such society. If the president or secretary of the society are not compellable by *mandamus* to sign the requisition, there is no means by which the members can get an alteration of the rules.

[*Erle, J.* In this case there was a strong desire, with good reason, on the part of a great majority of the members, to alter the rules, but there was no way of altering them except by a general meeting, and no way of convening a general meeting but by the signatures which the president and secretary withheld. The question is, whether the signature of the president or secretary is a ministerial act, in order to certify that a good notice has been given.]

The court granted a rule *nisi*.

Pashley now showed cause. The object of introducing the names of many officers into sect. 9 of stat. 10 Geo. 4, c. 56, was to give a discretionary power to several persons to sign the notice. By sect. 11, the society shall, at any of their usual meetings, or by their committee, if any such shall be appointed for the society, elect and appoint the officers of the society. In this society no committee has been appointed, and, therefore, the officers are appointed by the society at large. In *Reg. v. Bannatyne & others*, 2 Lownd. M. & P. 213; 4 Eng. Rep. 188, *Erle, J.*, said, "It appears to me that the legislature intended to prevent the rules from being altered, unless one of the chief officers should sign the requisition."

[*Lord Campbell, C. J.* If the president and the other principal officers refuse to sign the requisition, might the clerk sign it?]

¹ JUNE 7, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

Regina v. Aldham and the United Parishes Insurance Society.

That must have been intended, otherwise the names of other officers would not have been mentioned.

[*Lord Campbell*, C. J. Their names might have been added, that the requisition might not fall to the ground from the absence of the president.]

Peacock appeared for the secretary, and stated he was willing to abide by the decision of the court on this rule.

Hawkins, contra, was not called upon.

LORD CAMPBELL, C. J. I entertain the most profound respect for the opinion stated to have been given in this case, but I must exercise my own judgment; and it seems to me that it was the intention of the legislature to require that one of the officers named should sign the notice to call a meeting of members for the purpose of revising the rules, and not to give a power to the officers to withhold the opportunity of revising what, perhaps, they themselves had done; the signature of one of the officers was merely to authenticate the fact that seven members had signed the requisition. The words of sect. 9 of stat. 10 Geo. 4, c. 56, are, that the notice must be signed "by the secretary, or president, or other principal officer or clerk of such society." The repetition of the word "or" seems to me very strong to show that the signature was to be a formal act. Can it be supposed that, if the president refused to give his sanction to the holding of the meeting, the legislature intended to give a discretionary power to the clerk? Therefore, I am of opinion that one of the officers must sign the notice.

COLERIDGE, J. The circumstance which Mr. Pashley relied on appears to be against him; because, if it was intended that there should be a discretion in the officers to affix or withhold their signatures, so many officers would not have been mentioned; whereas, if the signature is merely formal, for the purpose of authenticating the requisition, the objection would be secured, viz., that under no circumstances might the signature of some officer for that purpose be wanting.

ERLE, J. In deciding this case when it was before me, I considered that the words of sect. 9 of stat. 10 Geo. 4, c. 56, justified me in holding that it was discretionary in the officers of the society to sign a notice calling a general meeting for altering the rules; and I thought I saw good reason why, with respect to these societies, there should be a restriction upon the power of only seven members to bring the existence of the society into peril; and, therefore, that the requisition should have the sanction of some one of the principal officers of the society; but as the other judges have a different opinion, the rule will be absolute.

Rule absolute.

Hancock v. Reede. — Same & Moore v. Same.

HANCOCK v. REEDE. — Same & MOORE v. Same.¹

Ball Court, Michaelmas Term, November 7 and 13, 1851.

Award — Effect of Agreement to refer — Finality — Sufficiency of Affidavits.

H. & M., being partners, had covered wires with gutta percha for R., in pursuance of a contract. They afterwards assigned the partnership business to C. H., with power to him to take proceedings in their name for the recovery of debts due to them, to enforce existing contracts, and to deal in respect thereof as they themselves might have done. C. H., after the assignment, also covered wires for R. on his own account, and brought two actions against him, one in his own name, the other in the name of H. & M. It had then been agreed between C. H. and R. to refer both actions, and all matters in difference, as well between H. & M. and R. as between C. H. and R., to arbitration; whereupon an order of reference was drawn up, and an award had been made:—

Held, on motion to set aside the order of reference and the award, that the agreement to refer both actions did away with the formal objection, that the order of reference did not sufficiently make it appear that both causes had been referred; as also the objection to the substance of it, that there was no consent of H. & M. thereto:—

Held, that the award was not bad for want of finality in awarding a discontinuance of H. & M.'s action without determining the cause of action, as it appeared that the discontinuance had been entered before or at the time of making the order of reference, and that it was left to the arbitrator to decide whether the discontinuance should remain, and it was intended that he should not proceed further in that action.

Semle, where an objection is made to an award for want of finality, the affidavits should clearly point out what matters have been brought before the arbitrator and left by him undetermined:—

Held, also, that there had been no excess of jurisdiction in disposing of the claim of R. for deductions from H. & M., inasmuch as that claim arose out of the same contract with respect to which the order of reference was made.

PITT TAYLOR moved, on behalf of the defendant, for a rule to show cause why the order of reference, the rule of court, the award, verdict, and rule to discontinue in these actions, should not be set aside. In 1849, Walter Hancock & Moore, the plaintiffs in one of the actions, were in partnership as gutta percha manufacturers, and Reede, who was under a contract to supply the Electric Telegraph Company with wires, applied to Hancock & Moore to cover the wires with gutta percha. They did so until the spring of 1850, when, being in difficulties, they assigned their business to Charles Hancock, the plaintiff in the other action, with power to use their names in any action he might bring to recover any debts due to the late firm. Charles Hancock continued the supply of gutta percha to Reede until differences arose as to the quality of the article supplied, which resulted in the two actions, both being brought by Charles Hancock, one in his own name, the other in the name of the late firm, under the power of attorney given to him for that purpose. The declarations claimed money in respect of goods sold and delivered, work and labor, and an account stated.

The pleas were — Never indebted, payment, and set-off.

Issue had been joined in the cause of *Hancock v. Reede*, but not in

Hancock v. Reede. — Same & Moore v. Same.

the cause of *Hancock & Moore v. Reede*. An order, however, was made at *nisi prius*, in the cause of *Hancock v. Reede*, referring that cause, and all matters in difference between the said parties, including all matters in difference in the other cause.

The first objection to the order was, that it did not appear to be made by consent of all the parties. Though Charles Hancock had power to sue in the name of the late firm, he had no power to refer a cause in their name, as his doing so might expose them to costs, to which they had not authorized him to render them liable. Charles Hancock was not empowered to refer to a domestic forum. The power was "to ask, demand, sue for, and receive" any debt, and "to bring or commence, or to discontinue or abandon, any action or other proceeding." But if he could refer any such action, he certainly could not refer other matters in difference between Hancock & Moore and Reede. Their liabilities were not transferred to Charles Hancock, as well as their rights.

[*Erle, J.* The order appears to refer matters in difference only as between Charles Hancock and Reede, and matters in the cause between Hancock & Moore and Reede.]

Then the award is bad, as it recites that the arbitrator has decided all matters in difference between all the parties; whereas Moore makes an affidavit that he did not consent to refer the action brought in his name.

[*Erle, J.* I think the general words of the power gave authority to his successor to refer any partnership matter; therefore, any affidavit stating that he did not do so would not help you.]

The arbitrator also finds, in his award, as to damages sustained by Reede, by reason of the inferior quality of the gutta percha, and also as to certain articles supplied by him to Hancock & Moore. This was in the nature of a claim against them; and, at all events, they gave to Charles Hancock no power to defend actions for them. If damages had been given against them, could they have been enforced?

[*Erle, J.* An award may be good in part, if it be severable.]

The grounds of the motion, and which were to be specified in the rule if it was granted, were, that the order was null. First, because no consent of the parties interested appeared in it. Secondly, the assent was negatived by affidavit. Thirdly, there was no mutuality. Fourthly, it was uncertain as to what was referred, and as to the consent given; and also because, after referring two causes, the word "cause" was used throughout the remainder of the order. Fifthly, it was insufficient, because it in fact gave the arbitrator power over only one cause. The objections to the award were, first, the want of mutuality. Secondly, that it was not final. While it decided that the cause of *Hancock & Moore v. Reede* should be discontinued, it did not dispose of the cause of action therein. The action might be recommenced, as if the plaintiffs had been nonsuited. *Wild v. Holt*, 9 M. & W. 161, which was recognized in *Tunncliffe v. Tedd*, 5 C. B. 557. *Wynne v. Edwards*, 12 M. & W. 708. Thirdly, it does not appear that all matters in difference between Charles Hancock

Hancock v. Reede.—Same & Moore v. Sama.

and Reede had been determined. The arbitrator finds, that "amongst the matters in difference" are certain claims as to the wires, and he decides that several of them were defective.

[*Erle, J.* That is no ground: the defendant complained of the wires being defectively covered, and the arbitrator finds that several were so. It may be that the several were all.]

Fourthly, it is not final as to certain galvanic batteries and spoiled wires. The arbitrator finds that, *at the time of making the order of reference*, they were the property of Reede, and were on the premises of Charles Hancock; and then orders Charles Hancock to allow Reede to take away so much as may *still* remain on the premises. Fifthly, it does not say by whom the claims between Hancock & Moore and Reede were disputed; and this omission was intentional, as Moore was called as a witness, and said that he did not dispute them. Sixthly, it is bad for excess of authority—first, in awarding as to differences between Hancock & Moore and Reede not in the cause between them; secondly, in examining Moore as a witness, the order giving him power to examine only the parties.

[*Erle, J.* Moore was called as a witness by Reede himself, was examined for him, and now Reede objects to his having been examined. It is a rule, that if a party has an objection, and does not take it, he waives it; and here Reede is complaining of his own act.]

Cur. adv. vult.

November 13. *ERLE, J.* A motion has been made to set aside an order of reference and an award, on several objections to the form and substance of those instruments; but they are all found to fail when the instruments are applied to the facts under which they were made. It appears there had been a contract between the defendant and a firm of Hancock & Moore, for covering wires with gutta percha, which had been acted on by both parties. Hancock & Moore assigned the partnership concern to Charles Hancock, with power to take any proceedings in their name for the recovery of any debt due to them, and to enforce any existing contract, and otherwise to deal in respect thereof as they themselves might have done. After this assignment, Charles Hancock had himself covered wires for the defendant, and then brought two actions against him, one in the name of Hancock & Moore, and the other in his own, upon a claim for the wires which had been covered. It was agreed with the defendant to refer both actions, and all matters in difference, as well between Hancock & Moore and the defendant as between the plaintiff and the defendant; and thereupon the order of reference was made. This at once disposes of the objection to the form of the order of reference, which is applicable in some parts to a reference of one, in others to a reference of two causes; and also of the objection in respect of its substance, on account of the alleged absence of the consent of Hancock & Moore thereto. Charles Hancock had authority in each case, and, although the language is inaccurate, the intention to refer both causes is sufficiently clear. The award was objected to as not being final in respect of the several matters; and the strongest point was

Ex parte Milner; in re Milner v. Rhoden.

the awarding a discontinuance of Hancock & Moore's action without determining the cause of action. But it appears the discontinuance had been entered at or before the order of reference, that the order of reference had been afterwards amended by consent, and thereby it was left to the arbitrator to decide whether the discontinuance should remain; and he had so decided. I think the amended order of reference meant that he should not further proceed in that action. There were other objections of want of finality; but the defendant does not point out any matter brought before the arbitrator, and left by him undetermined. Stress was made upon that portion of the award relating to the property in the batteries; but the question of property thus raised is decided, and the affidavits do not show any doubt or difficulty about the possession. The award was further objected to for excess of jurisdiction in disposing of the claim of the defendant to deductions from Hancock & Moore for supplying them with wires; and if the arbitrator had no jurisdiction over this matter in difference, there was a want of mutuality, which might have been fatal; but, as the claim arose out of the same contract in respect of which the order of reference was made, I think the authority given to Charles Hancock includes the matter in difference then in question. If he chose to enforce the right of Hancock & Moore to payment of their contract for covering the wires, he was obliged to show that the wires were covered according to the contract. The order was wide enough to give authority over that transaction. I have the less hesitation in coming to this conclusion upon this point, because the defendant, having himself brought forward the claims which were subject to these objections, and called Moore as his witness upon the reference, now relies upon Moore's affidavit to show that these very claims were improperly brought forward by him, and decided by the arbitrator. There will be no rule.

Rule refused.

*Ex parte MILNER; in re MILNER v. RHODEN.*¹

Michaelmas Term, November 17, 1851.

*Mandamus to the Judge of a County Court to hear and determine a
Plaint.*

Where a judge of a county court has entered upon the hearing of a plaint, and, from the evidence adduced before him, has decided that he had no jurisdiction to adjudicate between the parties, a *mandamus* will not lie commanding him to hear and determine it, even although he may be wrong in point of law.

Contra, if, in a case in which he has jurisdiction, he refuses to hear it, upon the mistaken notion that he has no jurisdiction to do so in respect of some preliminary matter.

R. having projected a benefit society, alleging in his prospectus that it was intended to be a branch of another society, which held out peculiar advantages to its subscribers, *M.* was induced to become a member, and continued so from 1841 to 1849, the society being conducted according to a code of rules of its own, and not as a branch society. A resolution

¹ 15 Jur. 1037.

Ex parte Milner; in re Milner v. Rhoden.

was then passed by some of the members, without the consent or knowledge of M., entirely changing the object of the society. M. withdrew, and brought an action in the county court for the recovery of his subscriptions. The judge, upon proof of these facts, decided that he had no jurisdiction to adjudicate between the parties, and nonsuited M.:—

Held, that a *mandamus* would not go commanding him to hear and determine the cause.

KENEALY moved for a rule calling upon the judge of the County Court of Shropshire, held at Madeley, to show cause why a *mandamus* should not issue commanding him to hear and determine a plaint in which Richard Childe Milner was the plaintiff, and Joseph Rhoden the defendant. Upon the hearing of the plaint, which claimed 8*l.* 1*s.* 8*d.* as money had and received, the following facts were proved: In 1841, the defendant had issued a prospectus for the purpose of founding a benefit society, as a branch of the Manchester Unity of Odd Fellows, the members whereof are entitled to benefit money, relief, hospitality, and introduction to business from any other branch of the same society, all the branches of the Manchester Unity being a brotherhood, and bound by their rules and ordinances to befriend the members of any other branch who may solicit their aid. The plaintiff relying upon the prospectus, and with the distinct assurance that the proposed Odd Fellows' club should be a branch of the Manchester Unity, had paid subscriptions, amounting to 8*l.* 1*s.* 8*d.*, to the defendant, who was appointed treasurer of the projected club, and at whose house the meetings for the purpose of founding it had been held. The club had never been enrolled under the statutes which regulate friendly societies, but had a code of rules in perfect accordance with the rules of the Manchester Unity. It continued in existence for some years, being always considered by the plaintiff and the other members as a branch of the Manchester Unity. In 1849, however, the defendant and other members passed a resolution that the club should be altogether changed, and cease to be connected with the Manchester Unity; and they agreed that it should be for the future a private benefit club, affording relief to its members only in its immediate locality. The plaintiff, with about twenty other members, knew nothing whatever of this resolution until after it had passed; and they then protested against it, and withdrew from any connection with the others, claiming, however, to have their subscriptions returned. The defendant and the other members refused to accede to this, and the plaintiff then brought this action to recover his share. Upon this evidence, the judge, after hearing counsel on both sides, decided that he had no power to adjudicate upon the claim, inasmuch as there was a partnership between the parties, and no liquidated balance had been struck; and, therefore, the question could be determined only in a court of equity. The plaintiff was accordingly nonsuited. It was now contended on his behalf, that where money is subscribed for a particular purpose, which is not carried out, it might be recovered back in an action for money had and received to the use of the subscriber. *Walstab v. Spottiswoode*, 15 M. & W. 501. *Nockels v. Crosby*, 3 B. & Cr. 814.

[*Erle, J.* This company existed from 1841 to 1849, and then there is a change, whereby the original purpose is defeated.]

Ex parte Milner; in re Milner v. Rhoden.

In *Reg. v. Richards*, 15 Jur. 359; s. c. 3 Eng. Rep. 410, it was held, that if inferior courts abstain from entering into the merits of a case in consequence of a wrong decision upon a preliminary matter, a *mandamus* will be issued to compel them to entertain the matter. The judge was wrong, and this court had jurisdiction to interfere.

ERLE, J. Where a question within the jurisdiction of the county court is brought before the judge, and decided by him, I have no jurisdiction to interfere upon the ground that he was wrong in point of law. It seems to me that the judge in this case had a full understanding of the facts; and even assuming he was wrong in point of law, the court will not issue a *mandamus* to compel him to rehear them. There is a distinction between this case and *Reg. v. Richards*. There the refusal to adjudicate was in respect of a preliminary matter, and the court, being of opinion that the judge was wrong in his decision as to that preliminary matter, held, that the case fell within the general principle, that where an inferior tribunal improperly refuses to enter upon a complaint, a *mandamus* will issue. But here the question was entertained and decided by the judge. It appears to me that he was right in his decision. The cases cited on behalf of the plaintiff, to show that he had a cause of action, are clearly distinguishable. If a party enter into an inchoate company, and deposit money in consideration of having an interest therein when it comes into existence, and it never does so, he may recover back the deposit. But this was not a company which was merely proposed to be formed, and never came into *esse*, but one which exercised its powers as a society from 1841 to 1849; then, in the absence of the complainant, a resolution is passed, whereby the main purpose for which he became a member is defeated; but the company being actually formed, I think this is a dispute between one partner and his fellow-partners, and the judge had some ground for his refusal to adjudicate.

Rule refused.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS :

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER ;

DURING THE YEAR 1851.

SCOTT v. DE RICHEBOURGH.¹

Trinity Term, June 11, 1851.

*Practice — Set-off of Costs — Attorney's Lien — 93d Reg. Gen.,
H. T., 2 Will. 4.*

A declaration contained three counts: on two counts issues in fact were found for the plaintiff; on the third, which was for a distinct cause of action, judgment on the demurrer had been given for the defendant:—

Held, that the defendant's costs of the demurrer must be deducted from the costs of the plaintiff; and that the defendant's attorney had no lien, the costs of the judgment on demurrer being interlocutory costs within the proviso of the 93d rule of Hilary term, 2 Will. 4.

Gregory v. The Duke of Brunswick, 3 C. B. 481, distinguished.

A RULE had been obtained by *J. Brown*, in Easter term, calling upon the defendant to show cause why satisfaction should not be entered on the roll in this cause, as to the judgment signed and entered upon the part of the defendant, the plaintiff also entering satisfaction upon the said roll for the like amount, in part satisfaction of the judgment recovered by the plaintiff against the defendant in this action. The declaration contained three counts — the first and second on distinct bills of exchange, the last on an account stated. On the first and last counts issues in fact were joined, and found for the plaintiff; on the second, judgment on demurrer had been given for the defendant. The plaintiff's costs of the issues in fact, and the defendant's costs of the demurrer, had been taxed on the same day, and

¹ 15 Jur. 882.

Scott v. De Richebourg.

a separate *allocatur* given for the amount of each; and the plaintiff now sought to set off and deduct the defendant's costs from his own costs and damages.

Hawkins (June 11) showed cause. If it were not for the question of the lien of the defendant's attorney upon the costs, there could be no opposition to this rule, but it is resisted on the ground that the lien of the attorney ought to be protected. It is true, these are costs in the same action, but the count on which the defendant obtained judgment is for a totally distinct cause of action, which, in fact, might have been made the subject of a separate action. By the rule of H. T., 2 Will. 4, r. 93, Arch. 110, "no set-off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs, in the particular suit against which the set-off is sought: provided nevertheless, that *interlocutory costs* in the *same* suit, awarded to the adverse party, may be deducted." Here it is submitted that the costs are *not interlocutory*.

[*Maule, J.* Surely they are so for this purpose. When there are two judgments in the same action, the costs of the first must be *interlocutory*.]

There were two distinct judgments on two distinct causes of action.

[*Jervis, C. J.* When this rule was moved, it was suggested that the practice of the courts was not uniform.]

The Court of Queen's Bench always protected the attorney's lien, and this court never regarded it, till the above rule made the practice uniform in all the courts. The question merely is, Are these *interlocutory costs*? — and it remains for the court to interpret the terms of the rule.

[*Talfourd, J.* Judgment on the demurrer is not final: error could not be brought till the other issues were disposed of.]

Jervis, C. J. In an action against several, could the costs obtained by one be set off against those incurred by another?]

They probably might.

J. Brown, in support of the rule. The point last put by the chief justice has been expressly decided in the affirmative in the cases of *George v. Elston & others*, 1 Bing. N. C. 513, and *Lees v. Refitt & others*, 3 Ad. & El. 707.

[*Maule, J.* If the costs in different actions are sought to be set off, which cannot be done without coming to the court, the attorney's lien is protected; but here the application need not have been made to the court. It was said, in a case in this court, *Dunn v. West*, 1 Lownd. M. & P. 1; s. c. 15 Jur. 88, 1 Eng. Rep. 325, two or three terms ago, that the court would not protect an attorney's lien on the costs where an action and all matters in difference had been referred to arbitration. Here these costs should have been set off on taxation.]

The costs of the whole action were before the master at once, but the attorney for the defendant demanded a separate *allocatur*, on the authority of the case of *Gregory v. The Duke of Brunswick*, in error, 3 C. B. 481.

Scott v. De Richebourg.

[*Jervis*, C. J. The court, in giving judgment in that case, (p. 493,) say, "The 3 & 4 Will. 4, c. 42, s. 34, provides, that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon *any* demurrer joined in *any* action whatever, the party in whose favor such judgment shall be given shall also have judgment to recover his costs in that behalf; and though the object of the statute was to provide for cases not included in the 8 & 9 Will. 3, c. 11, s. 2, which had been construed not to extend to any cases except where the plaintiff would have recovered his costs if he had recovered, its terms are so general, that there seems to be no question but that it gives a right to a judgment and costs in all cases of demurrer. It is impossible for us to take notice that the plaintiff has had those costs allowed by way of deduction out of the general costs given to the defendant, for there is no averment on the record to warrant such an assumption." So that they assume that the costs of the demurrer would be set off against the general costs on taxation.]

The rule of H. T., 2 Will. 4, r. 74, "That no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs," applies to issues *in fact* only; but the rule (r. 93) cited by Mr. Hawkins was merely made to reconcile the practice of all the courts, as costs in *different* actions in *this court* used to be set off, (see Chit. Arch. 110;) which is fully borne out by *Bridges v. Smyth*, 8 Bing. 29. Tindal, C. J., in giving judgment in *George v. Elston*, says, "I think the rule of H. T., 2 Will. 4, r. 93, applies to cases where there is a cross claim for costs in *separate* actions." *Lees v. Reffit* fully supports that view; and therefore, if, as in those actions, the costs of *one* defendant can be set off against *another* defendant, without regard to the attorney's lien, *a fortiori* the costs of one issue found *for* the defendant can be set off against the costs of the other issues found against the *same* defendant. There is no express decision on the point, and the only *dictum* to be found on the subject is that of Coleridge, J., in *Burdon v. Flower*, 7 Dowl. 786, who says, "If the defendant should succeed at the trial on the issues in fact raised on this record, he would have the costs of those issues to set off against the costs of the demurrer." The lien can only really be said to exist on a sum actually due after the balance has been struck. (See Chit. Arch. 110.) "The attorney's lien extends only to the balance which is ultimately to be paid over to the client upon the general and final result of the cause; and whatever costs may be due to the opposite party in the particular cause, whether they are costs of special issues found for him, or of interlocutory proceedings, he has a right to deduct them, without regard to the amount which may be due from the client to the attorney." If such costs may not be deducted from the general costs, this hardship might arise, that a plaintiff might, in effect, have to *pay* costs to an insolvent defendant, and receive none in return, although the balance on the whole were greatly in the plaintiff's favor.

 Robinson & Wife v. Bristol.

JERVIS, C. J. I think this rule must be made absolute. The case of *George v. Elston* shows that the rule in question only applies to costs in separate actions, when the lien of the attorney is sought to be evaded, and is protected by the court. This decision is in no respect conflicting with that of *Gregory v. The Duke of Brunswick*; in that case, no *award* of costs of the demurrer appeared on the record, in violation of the 3 & 4 Will. 4, c. 42, s. 34; but here, when the record is made up, such *award* will appear, although no costs have literally been paid.

MAULE, J. I am of the same opinion. The *interlocutory* costs mentioned in the proviso of the rule are all costs, the right to which accrued before the last stage of the suit, i. e., before the final judgment of the court upon the whole record. If we held otherwise, great hardship might possibly arise, as Mr. Brown has pointed out.

CRESSWELL, J. I see no reason to differ from the opinion of Tindal, C. J., expressed in *George v. Elston*.

TALFOURD, J., concurred.

Rule absolute.

ROBINSON & Wife v. BRISTOL.¹

Trinity Term, June 6 and 9, 1851.

Advowson — Quare Impedit — United Churches — Act of Union, Effect of — Words of Description in Deed — Disseizin by Usurpation — 7 Ann. c. 18.

A declaration in *quare impedit*, for disturbing the plaintiffs' presentation to the Church of B. with D. and A., alleged that one S. H. was seized of a moiety of the advowson of the said church in gross as of fee, and was entitled to present to the same, every alternate turn, the other moiety and alternate right belonging to the Earl of B.; and being so seized, S. H. presented, in his proper turn, his clerk, who was admitted, instituted, and inducted; that, on his resignation, the Earl of B. presented the said S. H.; that S. H. died so seized of the said moiety, which thereupon became vested in the plaintiffs in right of the wife as heiress of S. H., who are entitled to present in the turn which was of S. H.

Plea — That the plaintiffs ought not to present, because S. H. was not seized *modo et forma*. By a special verdict, it was found that B. with D. was a parish and rectory, and A. a parish and vicarage, in the same county and diocese, being two miles and a half apart, and both above the annual value of 6*l*. In 1718, the bishop of the diocese, at the request and with the consent of R. G. and the Earl of B., then patrons of A. and B. with D. respectively, and of the joint incumbent of the two churches, duly made an act of union, by which the vicarage and church of A., with its appurtenances, &c., was united and annexed to the rectory of B. with D.; and it was decreed that the united churches should be held and reputed as one benefice, and that one clerk, at the alternate presentation of the Earl of B. and R. G., should hold both as one benefice, under the name of the rector of B. with A. That after this union the representatives of R. G. and the Earl of B. respectively presented to the united churches on the first and second vacancies. That R. G., son and heir of the above R. G., in 1760, conveyed to S. H., in fee, "all that the perpetual advowson or alternate right of presentation of and to the vicarage of the parish church of A., and all

¹ 20 Law J. Rep. (n. s.) C. P. 208. 15 Jur. 726.

Robinson & Wife v. Bristol.

other the advowsons, tenements, and hereditaments, and parts and shares of advowsons, &c., of him, the said R. G., situate and being in A." That the title of S. H. to the moiety of the Church of B. with D. and A. was derived in no other way than by the above deed. That the subsequent presentations, including those in the declaration, were made to the united benefice alternately by those claiming under R. G., and the Earl of B.; and that all the interest of R. G., if any, after the act of union, in the advowson of A., became vested in S. H., in the declaration mentioned:—

Held, first, that assuming the act of union to have the legal effect of converting the two advowsons into one, such as described in the declaration, such advowson did not pass under the specific or general terms of the deed of 1760.

Secondly, that the presentation by S. H., as alleged in the declaration, was not conclusive in favor of the plaintiffs, inasmuch as usurpation, since the 7 Ann. c. 18, does not constitute a seizin, but only evidence of it; and the special verdict had negatived all title except by the deed of 1760.

Quere, whether the mere act of union by the bishop, at common law, has any legal effect on the rights and title of the patrons to their respective advowsons.

QUARE IMPEDIT. A special verdict was taken by consent at the trial, before Parke, B., at the Lincolnshire Summer assizes, 1849. The declaration was as follows: John, Bishop of Lincoln, Frederic William, Marquis of Bristol, and Lord Charles Hervey, were summoned to answer Harrison Robinson and Jane Mary his wife, of a plea, that they permit them to present a fit person to the Church of Brauncewell with Dunsby and Anwick, in the county of Lincoln, which is vacant, and belongs to their presentation in right of the said Jane Mary; and whereupon the said Harrison Robinson and Jane Mary his wife complain, for that whereas one Samuel Hazelwood, heretofore, to wit, on the 4th of June, 1812, *was seized of a moiety of the advowson of the Church of Brauncewell with Dunsby and Anwick, in the county of Lincoln, as in gross by itself as of fee and right, and was entitled to present to the same every alternate turn—that is to say, one turn in every two turns—the other moiety of the said advowson, and the other of the said two turns, then belonging to Frederic William, Earl of Bristol, as in gross by itself as of fee and right; and being so seized thereof, he, the said Samuel Hazelwood, afterwards, to wit, on the day and year last aforesaid, presented to the said church, then being vacant, in the proper turn of him, the said Samuel Hazelwood, one Robert Denny Rix Spooner, his clerk, who, on the present action of the said Samuel Hazelwood, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our late sovereign lord King George III.; and the said Samuel Hazelwood being so seized of the one moiety of the said advowson as aforesaid, and Frederic William, Earl of Bristol, being seized as of fee and right of the other moiety of the said advowson of the said Church of Brauncewell with Dunsby and Anwick, and of the right to present to the same in the other of the said two turns as aforesaid, the said church afterwards, to wit, on the 3d of June, 1826, became vacant by the resignation of the said Robert Denny Rix Spooner, whereby it then belonged to the said Frederic William, Earl of Bristol, as in his proper turn, to present to the said church; whereupon the said Frederic William, Earl of Bristol, to wit, on the 10th of June, 1826, presented to the said church the said Samuel Hazelwood, his clerk, who, on the presentation of the said Frederic*

Robinson & Wife v. Bristol.

William, Earl of Bristol, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our late sovereign lord King George IV.; and the said Samuel Hazelwood, being so seized of the said moiety of the said advowson of the said Church of Brauncewell with Dunsby and Anwick as above mentioned, afterwards, to wit, on the 18th of March, 1846, died so seized of his said estate therein, after whose death the said moiety of the said advowson descended to the said Jane Mary, then the wife of the said Harrison Robinson, as the only sister and heiress of the said Samuel Hazelwood, the then patron and holder thereof, whereby the said Harrison Robinson and Jane Mary his wife became seized of the said moiety of the said advowson of the said Church of Brauncewell with Dunsby and Anwick in the right of the said Jane Mary; and the said church having become vacant by the death of the said Samuel Hazelwood as aforesaid, and still being vacant, it then belonged, and still belongs, to them, the said Harrison Robinson and Jane Mary his wife, in right of the said Jane Mary, to present as in their proper turn — that is to say, in the turn which was of the said Samuel Hazelwood as aforesaid, a fit person to the said church, being so vacant as last aforesaid; and the said John, Bishop of Lincoln, Frederic William, Marquis of Bristol, and Lord Charles Hervey, unjustly hindered them from presenting a fit person to the said church, and still do hinder them, whereby, &c. To this the bishop pleaded the usual disclaimer. Lord Charles Hervey traversed having hindered the presentation; and the Marquis of Bristol, amongst other pleas, pleaded that the said Harrison Robinson and Jane Mary his wife ought not to present, as in the declaration mentioned, because he says that the said Samuel Hazelwood was not seized of a moiety of the advowson of the Church of Brauncewell with Dunsby and Anwick in manner and form as above alleged; on which issue was joined.

The following are the material parts of the special verdict: That before and at the time of the making of the act of union hereinafter mentioned, Brauncewell with Dunsby was a parish in the county of Lincoln, and a rectory, and that Anwick was then also a parish in the said county, and a vicarage, (the rectory of Anwick having been theretofore appropriated, and the said vicarage endowed according to law.) That before and at the time of the sealing and delivery of the deed hereinafter mentioned, Robert Gardiner was seized as of fee in gross of the advowson of the said vicarage of Anwick, and John, Lord Hervey, (afterwards John, Earl of Bristol,) was seized as of fee of the advowson of the said rectory of Brauncewell with Dunsby; and that, the said respective parties being so seized as aforesaid, a certain deed, bearing date the 29th of March, 1703, was then duly signed, sealed, and delivered by the said Robert Gardiner and the said John, Lord Hervey, respectively, namely, one part by the said Robert Gardiner, and the other part by the said John, Lord Hervey. The deed was then set out, which, after reciting that the parties were respectively seized as above of the advowsons of the two churches lying contiguous to one another, proceeded: "And whereas the said Robert Gardiner and the said John, Lord Hervey, are minded and desirous that the

Robinson & Wife v. Bristol.

cure of the said vicarage and rectory may for the future be supplied by one clerk; and whereas the said John, Lord Hervey, at the instance and request of the said Robert Gardiner, hath presented William Everingham, clerk, to the said Church of Brauncewell, the said William Everingham being formerly presented to the said vicarage of Anwick by the said Robert Gardiner, or those under whom he claims, the said Robert Gardiner, in consideration thereof, and of the sum of 10s. to the said Robert Gardiner by the said John, Lord Hervey, in hand paid, the said Robert Gardiner, for him, his heirs and assigns, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said John, Lord Hervey, and his assigns, the first and next advowson, nomination, presentation, and free disposition of the said vicarage of the Church of Anwick aforesaid, whensoever or howsoever the said church first and next shall happen to be void, any honest and learned clerk to present to the same, and to do and perform any other matter or thing touching or concerning the same.

“Item. It is agreed by and between the said parties to these presents, that in regard that the said two Churches of Anwick and Brauncewell are of small value, and may be well supplied by one clerk, which, being united and laid together, will be a convenient maintenance for one person, and for the future may be supplied accordingly, the said John, Lord Hervey, doth hereby, for him and his assigns, covenant and grant to and with the said Robert Gardiner, his heirs and assigns, that whensoever or howsoever the said rectory of Brauncewell shall be void after the first presentation made by the said John, Lord Hervey, to the said vicarage and Church of Anwick by virtue of these presents as aforesaid, that, then it may be lawful to and for the said Robert Gardiner, his heirs and assigns, to present one able and learned clerk to the said rectory and Church of Brauncewell; and it is hereby declared and agreed, that the said Robert Gardiner and the said John, Lord Hervey, their heirs and assigns, shall from time to time, and at all times hereafter, whensoever or howsoever the aforesaid Churches of Anwick and Brauncewell shall happen to be void, present their clerks to the same by turns, *alternis vicibus*,” &c. That, after the execution of the said deed, and in pursuance thereof, and before the making of the said act of union hereinafter particularly mentioned, namely, on the 23d of December, 1717, the Rev. Henry Craske was duly presented, instituted, and inducted to the said rectory of Brauncewell with Dunsby, and also on the same day to the said vicarage of Anwick, on the presentation of the said John, Earl of Bristol, to the said rectory and vicarage respectively. That, from the time of the sealing and delivering of the said deed, until, and at the time of, the making of the said act of union hereinafter mentioned, the said John, Lord Hervey, (afterwards John, Earl of Bristol,) continued to be, and was, seized as of fee of the said advowson of the said rectory of Brauncewell with Dunsby, and the said Robert Gardiner continued to be, and was, seized as of fee of the said advowson of the said vicarage of Anwick, subject respectively to the arrangement so made by the said deed; and that from the time of the said institution and

Robinson & Wife v. Bristol.

induction of the said Henry Craske, until, and at the time of, making the said act of union, the said Henry Craske continued to be, and was, the rector of Brauncewell with Dunsby aforesaid, and the vicar of Anwick aforesaid. That on the 26th of April, 1718, a certain act of union was made by the then Bishop of the diocese of Lincoln, being the diocese in which the said parishes and also the said rectory and vicarage were respectively situate, and which said act of union was made upon the petition and with the assent and consent of the said John, Earl of Bristol, and Robert Gardiner, (so being respectively seized as aforesaid,) as in the said act of union expressed, and of the said Henry Craske, so being such incumbent of the said rectory and vicarage respectively, and was duly signed by the said bishop, and sealed with his episcopal seal; and that all the facts recited therein are true; and which said act of union (after being translated from the Latin language into the English language) was, and is, as follows: "Edmund, by divine permission Bishop of Lincoln, to our beloved in Christ, Henry Craske, clerk, M. A., rector of the parish Church of Brauncewell, and also vicar of the parish Church of Anwick, respectively situate in the county of Lincoln, and of our diocese and jurisdiction, of the alternate patronage, as it is said, of the Right Hon. John, Earl of Bristol, and Robert Gardiner, gent., and to all others whomsoever, in any manner having, or who shall have, an interest in this behalf, health and grace. Whereas (as we are informed) the fruits, rents, revenues, tithes, and emoluments of the rectory of the said parish Church of Brauncewell, (which parish hath only three families,) not amounting to the annual value of 28*l.* of lawful money of Great Britain, are so small and slender that they are not sufficient for the proper maintenance of the minister according to the decency of the clerical order; whereas, also, the perpetual vicarage of the parish Church of Anwick aforesaid (which parish hath about twenty families) is only two miles and a half distant from the said rectory of Brauncewell, (no river or stream lying between,) the fruits of which vicarage, also not amounting to the annual value of 25*l.*, are not sufficient for the proper maintenance of the vicar thereof; whereas, moreover, the said two benefices have been accustomed for many years past to be served by one minister, for which reason, and because the parish of Brauncewell consists of so small a number of inhabitants, the Church of Anwick aforesaid may be conveniently served by the rector aforesaid; and for the causes aforesaid, and the better support of one minister, the union and consolidation of the said benefices is thought convenient and necessary; and whereas, furthermore, the aforesaid Right Hon. John, Earl of Bristol, and Robert Gardiner, the alternate patrons of the said benefices, as before mentioned, and the aforesaid Rev. Henry Craske, the present incumbent of the same, in a petition subscribed with their hands, and presented to us, have signified their mutual assent and consent to the union of the said churches, and have humbly prayed that we would graciously condescend to unite, annex, and incorporate the said Church of Anwick, with all its rights, members, and appurtenances, to the parish Church of Brauncewell aforesaid, and to consign the cure of the souls of the

Robinson & Wife v. Bristol.

said Church of Anwick to the rector of the said Church of Brauncewell for the time being, and to do other matters requisite in the premises; and whereas, lastly, we have found, by an inquisition duly made and returned by virtue of our commission, that the said suggestions evidently contain the truth in every particular, and that the aforesaid petition in this behalf is agreeable to reason, and the causes themselves, for making the union and consolidation of the said churches, to have been, and to be true, just, lawful, and sufficient, all and singular the matters which are required by law in this behalf concurring; we do, by and with the consent of all who are interested in this matter, as far as lies in our power, and the laws and statutes of this kingdom allow, (of our certain knowledge, for us and our successors, Bishops of Lincoln,) by these presents consolidate, unite, and annex the said vicarage and parish Church of Anwick, with its rights, members, and appurtenances, to the aforesaid rectory and parish Church of Brauncewell; and we do by these presents commit the cure of the souls of the parishioners of the said Church of Anwick to the now rector of the parish Church of Brauncewell aforesaid, and the rectors henceforward for the time being of the said Church of Brauncewell; and we will and decree by these presents, that the said united churches shall, from this time, be hereafter held and reputed as one benefice only, and that one fit person, at the alternate presentation of the said Right Hon. John, Earl of Bristol, and Robert Gardiner, their heirs and assigns, to be canonically instituted in the same by the diocesan of the place for the time being, shall at all times hereafter possess the same; so that it shall be lawful for you, the aforesaid Henry Craske, and your successors whomsoever, under the name of the rector of Brauncewell with Anwick, to take, and obtain possession of, both parish churches, and so obtained and united together as aforesaid, to continue, and retain, as one church and one benefice; and the trusts, rents, and revenues of the same so united, with their appurtenances, you may and can freely and lawfully convert, dispose of, and apply to your own use and advantage, and so may and can your successors; provided always, nevertheless, that the due and accustomed charges of the said churches shall, from time to time, be borne by you and your successors, and the sacred Word of God sincerely and religiously performed in the said parish churches; provided, also, that this union, annexation, and incorporation shall never in any manner tend or be understood to the prejudice or damage of our serene lord the king, George, by, &c., or his successors, in the first fruits, tithes, subsidies, or any other charges whatsoever, in any manner duly chargeable upon the said churches, nor of us or our successors, Bishops of Lincoln for the time being, or of the Archdeacons of Lincoln. All and singular which matters, in order that they may obtain the force of perpetual firmness, we have caused to be confirmed both by the subscription of our hand and appendage of our episcopal seal to this present writing, and by our ordinary and episcopal authority we confirm and approve by these presents. Dated the 26th day of April, A. D. 1718, and in the third year of our consecration."

That, after the making of the said act of union, no more separate

Robinson & Wife v. Bristol

presentations were made of two different clerks to the said rectory of Brauncewell with Dunsby, and to the said vicarage of Anwick, respectively, as had been the case prior to the making of the said deed of the 29th of March, 1703, aforesaid, and the institution of the said Henry Craske; but that, from thenceforth, upon the cession of the said Henry Craske as hereinafter mentioned, and all subsequent vacancies, one clerk was presented and instituted to the said united benefice, and such presentations were made (except in the case of lapse, as hereinafter particularly mentioned) in alternate turns by the respective parties claiming and deriving title under the said Robert Gardiner, and John, Earl of Bristol, respectively, in the manner hereinafter particularly mentioned. That upon the first vacancy which occurred after the said act of union, on the 27th of June, 1730, Robert Gardiner, clerk, was instituted to the said united benefice, by the name of "the rectory of Brauncewell with Anwick, in the county of Lincoln," which had become vacant by the cession of the said Henry Craske, in the said act of union named, on the presentation of Jane Gardiner, widow, relict of the said Robert Gardiner in the said act of union named, and who claimed and derived her title by and under the said last-named Robert Gardiner. That, upon the next vacancy which occurred after the said last-mentioned presentation, on the 3d of September, 1760, William Tonge, clerk, was instituted to the said united benefice by the name of "the rectory of Brauncewell with Anwick, in the county of Lincoln," which had then become vacant by the cession of the said Robert Gardiner, clerk, on the presentation of the then Earl of Bristol, who claimed and derived title by and under the said John, Earl of Bristol, in the said act of union mentioned. That afterwards, and before the next presentation, namely, on the 23d of December, 1760, the Rev. Robert Gardiner, the eldest son and heir of the said Robert Gardiner in the said act of union mentioned, by Jane his wife, then deceased, being the said Jane Gardiner before mentioned, duly made and executed to Samuel Hazelwood, of Heighington, in the county of Lincoln, the following indenture:—

The special verdict then set out an indenture "made the 23d of December, 1760, between the Rev. Robert Gardiner, clerk, (eldest son and heir of Robert Gardiner, late of Anwick, in the said county of Lincoln, gentleman, deceased, by Jane his wife, likewise deceased,) and Susanna his wife, of the one part, and Samuel Hazelwood of the other, wherein were recited indentures of lease and release of the 21st and 22d of March, 1758, respectively, the release being of seven parts, by which, *inter alia*, the said Robert Gardiner (party hereto) and Susanna his wife, and other parties named, granted, released, &c., to Thomas Newsome and John Sharpe, and their heirs, (amongst other lands and tenements,) all that the manor or moiety or half part of the manor or lordship of Anwick, with the rights, royalties, members, and appurtenances thereof, in the county of Lincoln; and also all that the rectory impropriate and parsonage of the parish Church of Anwick aforesaid, and all the arable lands, meadows, glebe lands, pastures, tithes, and appurtenances whatsoever to the said

Robinson & Wife v. Bristol.

rectory impropriate or parsonage belonging or in any wise appertaining; and also all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish Church of Anwick aforesaid, and all the glebe lands, tithes, and profits thereunto belonging and appertaining, &c.; and all other the manors or lordships, advowsons, impropriations, messuages, cottages, closes, lands, tenements, tithes, hereditaments, and parts and shares of manors or lordships, advowsons, impropriations, messuages, cottages, closes, lands, tenements, tithes, and hereditaments whatsoever of them, the said Robert Gardiner (party hereto) and Susanna his wife, &c., or any of them, situate and being in Anwick, Ruskington, and Haverholme," &c.

The deed then recites that "the said Samuel Hazelwood hath lately contracted and agreed with the said Robert Gardiner (party hereto) for the absolute purchase of the said manor, moiety, rectory, advowson, messuages, closes, lands, tenements, tithes, hereditaments, and premises hereinbefore particularly mentioned and described, for 4000*l.*," to be paid as therein expressed; and then conveys from the said Robert Gardiner and Susanna his wife, "to the said Samuel Hazelwood and his heirs, all and singular the said manor or moiety thereof, rectory impropriate, advowson, or alternate right of presentation, messuages, cottages, closes, lands, tenements, tithes, of whatsoever the same may consist, hereditaments, and premises hereinbefore mentioned and described, situate, lying, and being within the fields, precincts, or territories of Anwick, Ruskington, and Haverholme aforesaid, and in and by the said hereinbefore-recited indentures of lease and release (amongst other lands and tenements) granted and released as aforesaid, and every part and parcel thereof, with their and every of their rights, royalties, members, and appurtenances, and all the estate, right, title, interest, use, possession, trust, property, claim, and demand whatsoever of them, the said Robert Gardiner (party hereto) and Susanna his wife, of, in, or to the same, every or any part or parcel thereof, to have and to hold the said manor or moiety thereof, rectory impropriate, advowson, or alternate right of presentation, messuages, cottages, closes, lands, tenements, tithes, hereditaments, and premises hereby granted and released, or intended so to be, with their and every of their rights, royalties, members, and appurtenances, unto the said Samuel Hazelwood, his heirs and assigns, to the only proper use and behoof of him, the said Samuel Hazelwood, his heirs and assigns forever."

The special verdict then proceeds: That the title of the said last-mentioned Samuel Hazelwood to the said moiety of the said advowson of the Church of Brauncewell with Dunsby and Anwick, in the declaration mentioned, was derived in no other way than by the said indenture. That upon the vacancy which occurred after the said last-mentioned presentation, to wit, on the 3d of March, 1769, John Andrews, clerk, was instituted to the said united benefice by the name of "the rectory of Brauncewell with Dunsby and Anwick, in the county of Lincoln," which had become vacant by the cession of the said William Tonge, clerk, on the presentation of Jane Hazel-

Robinson & Wife v. Bristol.

wood and Richard Moore, patrons for that turn, and which said Jane Hazelwood and Richard Moore claimed and derived title by and under the said Robert Gardiner, in the said act of union mentioned. That upon the next vacancy, to wit, on the 19th of February, 1799, George Matthew was collated to the said united benefice by the name of "the rectory of Brauncewell with Dunsby and Anwick, in the county of Lincoln," which had become vacant by the death of the said John Andrews, clerk on the donation or collation of the then Lord Bishop of Lincoln for that turn, by reason of lapse, and which said lapse had occurred by reason of the neglect to present in due time by the parties then claiming under the said John, Earl of Bristol, in the said act of union mentioned. That upon the next vacancy, to wit, on the 4th of June, 1812, Robert Denny Rix Spooner, clerk, was instituted to the said united benefice by the name of "the rectory of Brauncewell with Dunsby and Anwick, in the county of Lincoln," which had then become vacant by the cession of the said George Matthew, clerk, on the presentation of Samuel Hazelwood, in the declaration mentioned, and which said Samuel Hazelwood claimed and derived title by and under the said Robert Gardiner, in the said act of union mentioned. That upon the next vacancy, to wit, on the 10th of June, 1826, the said Samuel Hazelwood, clerk, was instituted to the said united benefice by the name of "the rectory of Brauncewell with Dunsby and Anwick, in the county of Lincoln," which had then become vacant by the resignation of the said Robert Denny Rix Spooner, clerk, on the presentation of the defendant, Frederic William, then Earl of Bristol, and now Marquis of Bristol. That all the right, title, and interest of the said Robert Gardiner of and in the said advowson of the said vicarage of Anwick which the said Robert Gardiner had as aforesaid until and at the time of making the said act of union, subject to such alterations, if any, as were consequent on such act of union, became vested in the said Samuel Hazelwood in his lifetime; but whether the advowson, whereof the said last-mentioned Robert Gardiner was so seized, upon and immediately after the making of the said act of union, remained and continued in law the advowson of the vicarage of Anwick aforesaid, as before the said act of union, the jurors say that they are ignorant. That upon the 18th of March, 1846, the said Samuel Hazelwood died, and thereupon the said united benefice, to which the said Samuel Hazelwood had been so presented and instituted as aforesaid, then became and was and is vacant; but whether or not, upon the whole matter aforesaid, the said Samuel Hazelwood was seized of a moiety of the advowson of the Church of Brauncewell with Dunsby and Anwick, in manner and form as in the declaration alleged, the jurors are altogether ignorant, and pray, &c.

Peacock, (*Hayes* was with him,) June 6th, for the plaintiffs. The first question is, What was the effect of the act of union? The plaintiffs contend that its effect was to unite the churches, and to give the parties the alternate right of presentation to the united churches. *Harman v. Renew*, 1 Salk. 164, cites *Reynoldson v. Blake*, 1 Ld. Raym.

Robinson & Wife v. Bristol.

192, which shows "that the ancient church or rectory remains not, but a new church, a new patronage, a *novum aliquod tertium*" — in the language of Treby, C. J. In Dyer, 259, *a*, it was held, "by the union of two churches in A., they are so made one, that the patron may bring *quare impedit* by the name of the church in A., without distinction of the one or the other; and if an advowson appendant and another in gross be united, the new advowson will be appendant for one turn, and in gross for the other." All the necessary parties to make this a valid union at common law are here united, and the reasons recited for the union are such as are laid down in all the text writers. See 4 Burn's Eccl. L., tit. "Union." "The union or consolidation of churches ought to be founded on good canonical reasons; and the principal reasons assigned by the canon law are for hospitality, nearness of the places, want of inhabitants, poverty, or smallness of the living; and in such case, by the common law of the realm, the ordinaries, patrons, and incumbents may make a consolidation of the two churches into one." If Samuel Hazelwood was seized of any thing, he was seized as stated in the declaration in *Reynoldson v. Blake*, 1 Ld. Raym. 192. Powell, J., says, p. 197, "Patrons of united churches have also several rights, and, therefore, the writ of right ought to be *de medietate advocacionis*; and their possessions are also several, so that one may usurp upon the other, and drive him to his *quare impedit*." And *Wilson v. Van Mildert*, 2 B. & P. 394, shows that the united churches may be described as one church. See, also, Dy. 259, *a*. *Austin v. Twyne*, Cro. Eliz. 500, is an authority that the union may be effected at common law, though their value be above 6*l.*, and though, consequently, the stat. 37 Hen. 8, c. 21, does not apply. The union, therefore, gave each party a moiety of the advowson, with the alternate right of presentation. The plaintiffs also contend, if the other side say that this is not a good union, that it is not open to them to impeach its validity, or to say that no such church exists, on these pleadings, as it is admitted that the alternate presentations to the one church, as stated in the declaration, have been made; and the only issue is, whether Samuel Hazelwood was seized *modo et forma*. Moreover, since 1718, by the admitted presentations, each party has acquired, as against the other, such a right as we claim; and by the 3 & 4 Will. 4, c. 27, s. 30–34, the Marquis of Bristol is prevented from now disputing our alternate right of presentation. But, assuming this to be a valid union, the second question is, whether the deed of 1760 passed the advowson as altered by the union, and the alternate right of presentation. The specific clause in the deed, "all that the perpetual advowson, nomination, donation, or alternate right of presentation and free disposition of and to the vicarage of the parish Church of Anwick;" or, at any rate, the general words, "all other the advowsons, tenements, or hereditaments, or *parts* or *shares* of advowsons, &c., situate and being in Anwick," passed the advowson we claim. It was held in Dy. 323, *a*, that by a lease of "all hereditaments situate, lying, and being in T.," the advowson of the vicarage of T. passes. *Gully v. The Bishop of Exeter*, 4 Bing. 290, and Com. Dig., tit. "Advowson," C. 1, are in point, showing that, under the

words "all tenements or hereditaments in A.," the advowson of A. passes.

[*Jervis*, C. J. This is not a question of parcel or no parcel.]

There is no other advowson connected with Anwick but this united church, and it is as much in Anwick as Brauncewell. "All my close in Anwick" passes a close partly in Anwick and partly in Brauncewell. The right was in respect of the old advowson of Anwick. Before the union, Gardiner had the perpetual advowson of the vicarage of Anwick in fee, and, therefore, the advowson would pass under the general words. *Shep. Touch.* 230, "Grant." But if Samuel Hazelwood had no title by deed, still he had by presentation. The Marquis of Bristol stands in the place of Gardiner as to this; and a single presentation by a wrong-doer was a *quasi disseizin* of the true owner of the advowson, and drove him to his writ of right at common law.

[*Cresswell*, J. The allegation in the declaration is, that he was seized, &c., and, being so seized, presented; and the traverse is of that seizin.]

The presentation itself is a seizin; and *Tufton v. Temple*, *Vaugh.* 1, shows that the seizin without presentation confers no title, and that it is a title in itself, and the right of advowson passed to the sister and heiress at law. Lastly, the marquis cannot have a writ to the bishop if he succeeds, on these pleadings, for he has admitted he has only the alternate right.

Cowling, (*Scotland* was with him,) contra. First, as to the act of union. No alteration could be made by the deed of 1703 in the advowsons; each remained unaffected; for it is notorious that more than one living could not be held at the same time without dispensation. 3 Burn's *Eccl. L.* 118, tit. "Plurality." *Alston v. Atlay*, 7 Ad. & El. 311. What, then, was the effect of this act of union? To render the incumbent a legal pluralist, and no more. *Linwood's Provinciale*, b. 3, tit. 9, p. 159. "Fit etiam unio ecclesiarum sic quod unus fit prælatus ambarum, et tunc utraque remanet in statu suo ut prius exceptâ prelaturâ. Fit etiam unio duarum ecclesiarum adinvicem et tunc consuetudines et privilegia, quæ in alterâ earum habentur meliora et humaniora tenenda sunt." And see the judgment of Treby, C. J., in *Reynoldson v. Blake*, 1 Lord Raym. 199, citing this among other authorities. *Godolphin's Repertorium*, 170, gives the same account of these unions, as well as what are reasons for such consolidations. At p. 209, he shows that the advowson is a temporal, and not a spiritual inheritance. But *Austin v. Twyne* shows that the union is a question for the spiritual courts. So, in *Gibson's Codex*, tit. 38, c. 1, p. 920, 2d ed., "By the union of two churches, no change is made in the advowsons; that is, not only all rights are reserved to the patrons as before, but the nature of the advowsons continues the same," &c.

[*Jervis*, C. J. The 37 Hen. 8, c. 21, enables a perfect union to be made.]

This is a union at common law, the value and distance being too

 Robinson & Wife v. Bristol.

great to bring it within the statute. In *Harman v. Renew*, 3 Salk. 87, it is said, "It was held that at common law two churches might be united by the concurrence of the patron, parson, and ordinary; it was further held, that though in such case there is but one parson to both churches, yet the two churches remain, and the two patronages and the two parishes." And even if any greater effect is to be given to this act of union, still the presentation would be to the Church of Brauncewell, but the advowson would be unaltered; and this is the result of the cases cited by the other side. In *Reynoldson v. Blake*, Powell, J., says, p. 196, "But the union made it but one church and one benefice, and it is the benefice to which the union is made;" agreeing with Godolphin, 170. And in a note at the end of the case it is said, "Powell, J., said to Treby, C. J., that Holt, C. J., agreed with him as to the second point, against the opinion of Treby." The only authority, therefore, in that case, for the plaintiffs, is that of Treby, C. J., which, we contend is overruled by the House of Lords, (see 3 Lev. 437;) and, therefore, it is contended that the plaintiffs should have declared for Brauncewell alone. So, in Dy. 259, a, it appears that one church was extinguished, and no new advowson created.

[*Jervis*, C. J. Then you say that there must be a deed between the two parties to complete the union as to the advowson?]

Yes, I should say such was necessary here; the 1 & 2 Vict. c. 106, s. 15-20, has now altered the law as to uniting churches. *Wilson v. Van Mildert* is against the plaintiffs, as far as regards the advowson remaining unaltered at common law; but there, by virtue of the special act of Parliament, each party was entitled alternately to present one clerk to the one church and both benefices.

[*Maule*, J. You said, in answer to the chief justice, that, in order to affect the right of advowson, there must be a grant; but several text books of authority omit all mention of this, and some reported cases too.]

That is so as to the text writers; but the cases are not cases of union at common law, but under acts of Parliament. There would be no difficulty in the present case in stating the title, as was done in *Reynoldson v. Blake*. In the above view of the case, the 3 & 4 Will. 4, c. 27, cannot apply, as it could not have the effect of creating a new advowson. Secondly, assuming that there is such an *aliquod tertium* as described in the declaration, then we contend that it did not pass by the deed of 1760. It is not the case of a *falsa demonstratio*, but there is no *demonstratio* at all; for if the plaintiffs are right as to the effect of the union, there was no such thing existing as that described in the deed. I do not dispute the correctness of the cases cited by the other side on this point, but I do their application; for, according to the plaintiffs' own argument, there is no longer any advowson "in," or "of" (if they prefer it) Anwick. As to the point made of seizin by the presentation in 1812, though at common law a usurped presentation was a disseizin, the stat. 7 Ann. c. 18, obviates that effect, and now it is only some evidence of title, and nothing more. If necessary, the case in *Vaughan* is distinguishable from

Robinson & Wife v. Bristol.

this; here there is no *induction* found. We therefore submit, first, there was merely an imperfect union; secondly, if there were, it did not touch the right of advowson; thirdly, assuming both points in favor of the plaintiffs, there was no title as claimed conveyed by the deed, and the jury find that the only title is by that deed.

Peacock, (June 9.) in reply. *Reynoldson v. Blake*, if properly examined, is in our favor, viz., that we were right in describing the advowson as in the declaration. Gibson's Codex, 920, shows that the churches became one, for he says, "By the union, the churches have become so much one, that a second benefice may be taken by dispensation within the Statute of Pluralities;" and to the same effect is *Reg. v. Page*, Cro. Eliz. 719. In *Coppledick v. Tansey*, Hutt. 31, it was held, that a united church, being known by the name of one of the old names, or both united, might be described either way. As to the point made regarding induction: induction, if necessary, is admitted on the pleadings.

[*Jervis*, C. J. That is not admitted for the purpose of showing seizin.

Maule, J. In order to complete your title, you state the induction of the clerk; all that the admission made by the traverse amounts to is this — prove the matter I deny, and for that purpose I admit every thing else, but no further.]

Institution, and not induction, is all that is necessary to give title to the patron; the owner of the advowson has nothing to do with the induction. 1 Burn's Eccl. L. 170, tit. "Benefice;" Rosc. Real Act. 234. By institution only the clerk does not get actual seizin, but the owner may.

[*Maule*, J. The patron takes by the hand of the clerk, and it is the same as in other cases of a tenant; if he had nothing to do with the tithes, institution would be sufficient.]

The owner of the advowson has nothing to do with the tithes; institution makes a plenarty. The objection to the complete effect of the union is, that the patrons have not executed a conveyance under seal of the right to present; but that is not necessary. It is true, at common law, the right of advowson is not changed without it; but as soon as the union is effected by the canon law, then the temporal courts take notice of it.

[*Jervis*, C. J. For what, then, was the stat. 37 Hen. 8, c. 21?

Maule, J. One would certainly infer from it that there was no such power at common law.]

Gibson's Codex (p. 920, note to the statute) shows clearly that there was such a common-law power; so, 4 Burn's Eccl. L., tit. "Union."

[*Maule*, J. Might it not be, that at common law such union was treated as an agreement that each should present for the other in every alternate turn, and, therefore, that the act was passed to enable the parties to unite two unequal livings on such terms as they may agree?]

Probably that may be the reason, as there is no case in which, at

Aldis v. Mason.

and at all times during the said term or terms thereby created, properly maintain, amend, uphold, and keep all and singular the said demised premises and every part thereof, with the walls, partitions, roofs, fences, glass and other windows, casements, window shutters, doors, water closets, pumps, privies, gutters, drains, sewers, and way draughts, and all other things to the said premises belonging, in, by, and with needful and proper reparations, cleansings, and amendments whatsoever, with the appurtenances thereunto belonging, in good and tenantable repair and condition, and should and would, during the term and terms thereby created, paint or cause to be painted twice over, in good oil colors, every three years, all the external wood, iron, and stone work or other work heretofore or usually painted of or belonging to the same, and which have been, or usually are, painted; and also that the said defendant, his executors, &c., should not carry on, or permit or suffer to be carried on, in or upon the said demised premises, or any part of them, or any part thereof, without the previous consent in writing of the said plaintiff, his executors, &c., any noxious, noisy, or offensive trade or business whatsoever, as by the said indenture, reference being thereunto had, will more fully and at large appear; and although the plaintiff has always, from the time of making the said indenture, hitherto well and duly performed, fulfilled, and kept all therein contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning thereof; yet the defendant did not, nor would, at all times during the said term of twenty-one years by the said indenture created, properly maintain, amend, uphold, and keep all and singular the said premises by the said indenture demised for the said term of twenty-one years, and every part thereof, with the walls, partitions, roofs, fences, &c., to the said premises belonging, in, by, and with needful and proper reparations, cleansings, and amendments whatsoever, with the appurtenances thereunto belonging, in good and tenantable repair and condition, according to the form and effect of the said indenture in that behalf, but omitted and neglected so to do; and he, the defendant, after the making the said indenture as aforesaid, and during the said last-mentioned term of twenty-one years by the said indenture created, to wit, on the 1st of November, 1850, and from thence continually for a long time, to wit, from thence hitherto, suffered and permitted the said premises demised for the said term of twenty-one years as aforesaid, and every part thereof, to be, and continue, and the same were for and during all that time ruinous, prostrate, fallen down, foul, miry, choked up, in great decay, and in bad and untenable repair and condition, for want of needful and proper reparations, cleansings, and amendments to the same, contrary to the form and effect of the said indenture and of the covenant so made by the defendant as aforesaid; and the plaintiff further says that the defendant did not, nor would, at all times during the said term of eighteen years wanting ten days by the said indenture created, properly maintain, amend, uphold, and keep all and singular the said premises by the said indenture demised for the said term of eighteen years want-

Aldis v. Mason.

ing ten days, and every part thereof, with the walls, partitions, &c., to the said last-mentioned premises belonging, in, by, and with needful and proper reparations, cleansings, and amendments whatsoever, with the appurtenances thereunto belonging, in good and tenantable repair and condition, according to the form and effect of the said indenture in that behalf, but omitted and neglected so to do, and the defendant, after the making the said indenture as aforesaid, and during the said last-mentioned term of eighteen years wanting ten days, by the said indenture created, to wit, on the 1st of November, 1850, and from thence continually for a long time, to wit, from thence hitherto, suffered and permitted the said premises demised for the said term of eighteen years wanting ten days as aforesaid, and every part thereof, to be, and continue, and the same were for and during all that time ruinous, prostrate, fallen down, &c.

Plea as to the first breach. That the defendant did not, during the said term of twenty-one years by the said indenture created, suffer or permit the said premises so demised for the term last aforesaid, or any part thereof, to be or continue, nor were the same for or during all the said time ruinous, prostrate, fallen down, foul, miry, &c.

Second plea. A similar one to the second breach of the declaration.

Special demurrer to both pleas, and joinder therein.

Willes, in support of the demurrer. The principal objection to the pleas is, that they are too large. They apply to the whole period of the demises, and allege that the premises were not out of repair during all the time, whereas if at any time they were out of repair, the plaintiff would have been entitled to sue. The defendant ought to have pleaded performance of the covenant.

[*Jervis*, C. J. The plea would have been right if it had stated affirmatively that the defendant did repair during all the term, but it alleges that the premises were not out of repair during the whole term.]

Pigott, contra. The pleas are not demurrable. There are precedents both ways in the books; in some the traverse is negative, and in others it is affirmative. The pleas are not too large. The time is alleged in the breaches in two different ways: first, as during the term; and then, to wit, from a specific day. The allegation following the *videlicet* is immaterial, and may be struck out. Then, the words "during the term" must mean at any time during the term. If that allegation be immaterial, the plea cannot give it materiality. In the case of *Palmer v. Gooden*, 8 Mee. & W. 890; s. c. 11 Law J. Rep. (n. s.) Exch. 424, this court, reversing the judgment of the Court of Exchequer, held that a replication traversing that the plaintiffs had entered upon certain tolls, and ejected and expelled the defendant, was held not to be bad on special demurrer, although it put in issue the entry which was immaterial and impossible.

[*Maule*, J. In this case, the longer the premises were out of repair, the more cause of action there was. The statement of time is not

Lambert v. Smith.

surplusage. Surplusage is that which does not help at all, as if you were to state that a man had a blue coat on, and did a certain thing; but it is not surplusage to say that the defendant knocked the plaintiff down, and *also* tore his clothes, and *also* put his eye out. Before the statute of William, if two breaches were stated, it could not have been said that one of them was surplusage. Every portion of the time was material.]

It is submitted that it was not necessary to allege any time. The old strictness has not been adhered to in recent cases.

*Per curiam.*¹

Judgment for the plaintiff.

LAMBERT v. SMITH.²

Trinity Term, June 14, 1851.

Insolvent Act, 1 & 2 Vict. c. 110, s. 69, 75 — Discharge — Schedule.

Where an insolvent, who had accepted and given to the payee a bill drawn on him by J. S., described the bill in his schedule as drawn by J. S., but did not name the payee or allege that the holder was unknown:—

Held, that the insolvent was not discharged as to the payee under the 75th section of the 1 & 2 Vict. c. 110; confirming *Pugh v. Hookham*, 2 Car. & P. 376.

Semle, also, that the description in the schedule was not sufficient under the 69th section.

ASSUMPSIT on a bill of exchange drawn by John Simons upon and accepted by the defendant, and made payable to the plaintiff.

Plea — That the defendant was discharged under the Act for the Relief of Insolvent Debtors.

It appeared at the trial that the plaintiff's clerk took the bill to the defendant for his acceptance, that the defendant returned it accepted, and that it never had been out of the possession of the plaintiff. On behalf of the defendant, his schedule in the Insolvent Court was put in, and the bill in question appeared therein described as drawn by Simons and accepted by the defendant, but no mention was made of the plaintiff as payee, nor was it alleged that the holder was unknown. For the plaintiff, it was contended that, as his name was not inserted in the schedule, the defendant was not discharged as against him under the 1 & 2 Vict. c. 110, s. 75. On this ground the learned judge directed a verdict for the plaintiff.

A rule *nisi* was subsequently obtained to set aside the verdict and enter a verdict for the defendant.

Phipson now showed cause. The defendant was not entitled to his discharge from this bill as against the plaintiff, under the 75th section of the Insolvent Act. By that section, a defendant may get his

¹ JERVIS, C. J., MAULE, CRESSWELL, and TALFOURD, JJ.

² 20 LAW J. Rep. (N. S.) C. P. 195.

Lambert v. Smith.

discharge as to a bill, if it be properly described. He ought to state who is the holder, or that the holder is unknown.

[*Maule, J.* The defendant knew that the plaintiff was once the holder of the bill; but the object of getting a bill of exchange is to negotiate it.]

The authorities show that, when the holder is unknown, it is necessary to allege that fact.

[*Maule, J.* The question is, when it is desired to point out who is the holder, and it is shown that one person has been the holder, is it necessary to show who was actual holder?]

When an insolvent has no knowledge at all about the holder, he must give the best description of the bill he can. The case of *Reeves v. Lambert*, 4 B. & C. 214, in which it is decided that a bill payable to one and indorsed over to another, may be described without giving the holder's name, is quite distinguishable.

[*Jervis, C. J.* That case may have been the foundation of the provision in the Insolvent Act.]

In *Pugh v. Hookham*, 5 Car. & P. 376, it was held, that it may be presumed that a bill continues in the hands of a party to whom the insolvent knew it had been indorsed, till the contrary is shown, and notice must be given to that indorser. The stat. of 7 Geo. 4, c. 57, s. 46, on which that case was decided, was substantially the same as that of the 1 & 2 Vict. c. 110, in this respect. Now, the defendant in this case knew that the bill had come into the hands of the plaintiff, and, therefore, he ought to have inserted the plaintiff's name in the schedule. *Boydell v. Champneys*, 2 Mee. & W. 433; s. c. 6 Law J. Rep. (N. S.) Exch. 122, and *Beck v. Beverly*, 11 Mee. & W. 845, are cases to show that the holder's name should be inserted, or that it should be stated he is unknown. The provisions of the Insolvent Act, which show that small discrepancies as to accounts will not vitiate the discharge, are not applicable to the present case.

Hawkins, in support of the rule. It cannot be contended that notice to every creditor is a necessary ingredient to a discharge. *Beck v. Beverly* is an authority that it is not. The 69th section prescribes the mode in which the schedule shall be framed, and prescribes its contents. It means that the schedule is to contain a full and true description of the persons whom the insolvent knows to be holders and creditors at the time of filing the petition, and not of persons who, before that time, had claims on the bills.

[*Cresswell, J.* But is the insolvent not indebted to the payee? He is so in a different sense from that in which he is liable by the law merchant to pay an indorsee.]

Pugh v. Hookham, the strongest case on the other side, occurred at *nisi prius*, and the point was not reserved, nor any question raised afterwards. At the adjudication, the insolvent swears that he believes the person mentioned in the schedule is holder. If there be any proof to the contrary, it should come from the other side. Supposing the

Lambert v. Smith.

insolvent knew the bill had passed through a number of hands, but did not know who they were?

[*Jervis, C. J.* He might name the last he knew, and add, "or other holder."]

It is submitted that it does not appear the defendant knew the plaintiff to be the holder at the time of the adjudication. He only knew that the plaintiff was once holder.

[*Jervis, C. J.* Why is not that stated in the schedule? You clearly knew the plaintiff was once holder, but not that he had ceased to be so.]

Sect. 93 of the act, which provides that errors in amount without culpable negligence or fraud on the part of the prisoner shall not prevent his discharge, shows that it was not the intention of the legislature that the act should be construed too strictly with respect to the description in the schedule.

[*Maule, J.* I am disposed to think that the 69th and 75th sections together call upon the prisoner to give a true description of all his debts due or growing due, and of all his creditors. Thus I should think that when a person had accepted a bill for a good consideration, which might be in the hands of third parties, he would be obliged, under sect. 69, to describe the bill; but then sect. 75 says, that the prisoner shall be discharged as against every person named in the schedule, and as to the claims of all other persons not known to the prisoner, that is, though not named in the schedule.]

The 75th section does not discharge the insolvent, because the real holder was not known to him.

JERVIS, C. J. I am of opinion that this rule ought to be discharged. It is not necessary to determine whether under this act the description of a negotiable instrument ought accurately to set forth all its particulars, or whether it is sufficient to state the original creditor; because, even if the bill here were sufficiently described in the schedule, the insolvent was not discharged in respect of it as against the plaintiff. The 75th section provides that a prisoner shall be discharged as to the several debts due at the time of the vesting order to the several persons named in his schedule as creditors, and as to the claims of other persons not known to him at the time, who shall be holders or indorsees of negotiable instruments. The question then arises, On whom is the burden of proving the want of knowledge? Here it appears clearly that the defendant knew the plaintiff to have been the holder of the bill, and the discharge operates as to those who are known only if they are named. I think that the decision of *Tindal, C. J.*, in *Pugh v. Hookham*, is an express authority that with respect to an indorsee, if an insolvent wishes the discharge to operate as against him, he should name him.

MAULE, J. I agree in this case that the discharge is inoperative with respect to the claim of the plaintiff. The spirit of the act is this, that the insolvent shall be discharged, but, as a condition of his discharge, he must name in his schedule all his creditors, or those who claim to be his creditors, and describe their debts. It may happen,

Cawley, Appellant; Furnell & another, Respondents.

in the case of negotiable securities, that he cannot describe all the creditors by name; but it does not follow that he can give no description. There is no reason why the debtor should not give a description as far as he can. The 69th section says, not that the insolvent shall give a full and true description of all his creditors, but as full and true a description as he can give. We may say that the act requires a full description, if the insolvent can give it; but if he does not know the name of the creditor, that he should describe him as holder or entitled by indorsement to such or such a debt. That is not a perfect way of calling the attention of the person described; but if the insolvent does not know more, that is no reason why he should not be called upon to give such a description as he can. I think the 75th section proceeds upon the supposition that such a description has been given. Otherwise, the effect would be that a prisoner might be discharged as against persons in no manner described, although he might easily have described them, if not by name, yet in another way. There is no reason why an insolvent should be discharged as against the holder of a bill without mentioning him. If that be so, the defendant clearly was not discharged in this case. But the case of *Pugh v. Hookham* is a direct authority, and was, I think, properly decided. The sum of the matter then is, that on the construction of the 69th section I should be disposed to think the schedule would not do, but I think that the matter is substantially decided already by Tindal, C. J., in *Pugh v. Hookham*. The rule, therefore, must be discharged.

CRESSWELL, J. I am of the same opinion. With respect to the 69th section, I agree with my brother Maule, that there is great reason to suppose that the insolvent should describe the holders of a negotiable instrument in his schedule. On the 75th section, there is the direct authority of the case decided by Tindal, C. J., that this rule should be discharged.

TALFOURD, J., concurred.

Rule discharged.

COUNTY COURT APPEAL.

CAWLEY, Appellant; FURNELL & another, Respondents.¹

Trinity Term, June 21, 1851.

County Court Appeal — Determination in Point of Law — In what Cases Appeal lies — Nature and Practice of Court of Appeal — Statute of Limitations, Acknowledgment to defeat.

Where an appeal is made against the determination of a county court in point of law, the case stated for the opinion of the Court of Appeal should separate the facts and law.

Though questions as to fact, as well as of law, are in contest before the judge of the county court without a jury, an appeal will lie if the court of appeal can see from the facts of the

¹ 20 Law J. Rep. (N. S.) C. P. 197. 15 Jur. 908.

Cawley, Appellant; Furnell & another, Respondents.

case, as stated, that the judge, in order to arrive at his judgment, must have decided a question of law in a particular way.

Seem, that no appeal will lie if the decision of the county court judge can be supported by any view of the facts stated in the case, which does not render it necessary to conclude that he has determined the particular point of law in the way complained of as erroneous.

The following letter was written by the defendant to the plaintiff, in respect of a debt more than six years due: "I am much surprised at receiving a letter from H. K., this morning, for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechmicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. was in town:"—

Held not sufficient [under stat. 9 Geo. 4, c. 14] to take the case out of the Statute of Limitations.

THIS was an action on contract, tried at the County Court of Dorsetshire, at Poole, on the 13th of November, 1850. Neither party demanded a jury. The action was for goods sold and delivered by the plaintiffs to the defendants, in the year 1842, to the amount of 50*l.* 16*s.* 5*d.*, which, after giving credit to the defendants for goods sold by them to the plaintiffs, to the amount of 16*l.* 4*s.* 4*d.*, left due to the plaintiffs the sum of 34*l.* 12*s.* 1*d.*

The defendant Edward Cawley not being duly served with the summons to appear, the action proceeded, pursuant to sect. 68 of the 9 & 10 Vict. c. 95, against Joseph Cawley alone.

The defendant Joseph Cawley, by his attorney, admitted, at the trial, that the balance of 34*l.* 12*s.* 1*d.* was owing from the defendants to the plaintiffs, but relied on the Statute of Limitations for his defence, of which due notice had been given, pursuant to sect. 76 of the said act. To take the case out of the Statute of Limitations, the plaintiffs called a witness, Joseph Furnell, who proved that, as an agent of the plaintiffs, he had an interview with both the defendants in London in the year 1844, when the plaintiffs' and defendants' accounts were stated, and the balance of 34*l.* 12*s.* 1*d.* admitted by the defendants to be due to the plaintiffs; that the defendants then stated to this witness that it would be more convenient for them to pay in goods than money; that in March, 1845, he had another interview with the defendant Joseph Cawley, and also with Edward Cawley, but not with both together, and applied again for the balance, 34*l.* 12*s.* 1*d.*, when Joseph Cawley stated that it would be more convenient to pay in goods than money, and proposed to meet him, Joseph Furnell, at the Pantechmicon, in London, where the defendants had goods then deposited; that he accordingly met Joseph Cawley at the Pantechmicon on the day following, when he, Joseph Cawley, pointed out the goods belonging to the defendants, and wrote a list of the goods, with the prices, in his, Joseph Furnell's, book, and offered any of them in liquidation of the debt of the plaintiffs; that he, Joseph Furnell, then and there agreed to take two bedsteads, one marked 20*l.* and another 15*l.* 10*s.*, subject to the plaintiffs' approval, and to be forwarded according to the plaintiffs' letter. It was also proved by the defendant Joseph Cawley, that when goods are deposited at the Pantechmicon the charge upon them is not told to the depositors, but that when the goods are sold the charge upon them is

Cawley, Appellant; Furnell & another, Respondents.

then given. Nothing was said at either of the above-mentioned interviews in London, in 1845, about the charges at the Pantechmicon for the deposit of the goods there.

It was also proved, that on or about the 1st of April, 1845, the plaintiffs addressed and sent by post the following letter to the defendant Edward Cawley:—

“ Poole, April 1, 1845.

“ MR. EDWARD CAWLEY. Sir,— Our Mr. Furnell was disappointed at your not meeting him on Saturday morning, as you proposed, and that you did not call on him at Wood's Hotel on Monday morning. He, however, saw Mr. Joseph Cawley on Saturday at the Pantechmicon, who agreed to forward us two bedsteads, as a set-off against our account, amounting to about 35*l.*, particulars of which were then given him, one a half tester bedstead, with white good chintz furniture, marked 18*l.*, the other a spiral four post, with green damask furniture and a mattress, marked 22*l.* These you will please pack carefully and deliver, not later than Thursday week the 10th inst., (earlier if possible,) at Chamberlain's Wharf, to be forwarded to us by Messrs. Wanhill's Poole coaster. If this is not punctually complied with, we shall at once feel compelled to take steps unpleasant to all parties. You will please inform your brother of the subject of this letter, and advise us when the bedsteads are delivered at the wharf.

“ We are, sir, your obedient servants,

“ FURNELL & JOYCE.”

No goods being sent, the plaintiffs instructed one Henry Knight, an attorney, to apply for payment of the debt, who accordingly wrote to the two defendants. In the month of April, 1845, the plaintiffs received by post a letter, which was put in evidence at the trial, and proved to the satisfaction of the judge of the county court to have been signed by the defendant Joseph Cawley. The following is a copy of the letter:—

“ April 25, 1845.

“ MESSRS. FURNELL & JOYCE,— I am much surprised at receiving a letter from Henry Knight this morning for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechmicon by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. Furnell was in town. You are welcome to issue as many writs as you think proper; but if you continue to press the thing, I shall immediately put myself under the protection of the court. My brother Edward has met with a very serious accident, and is unable to attend to any thing.

“ I am, gentlemen, your obedient servant,

“ J. CAWLEY.”

Judgment was given for the plaintiffs, against which J. Cawley served notice of appeal. The question for the opinion of the court was, whether the action was barred by the Statute of Limitations, or whether the plaintiff was entitled to judgment for 34*l.* 12*s.* 1*d.*

Cawley, Appellant; Furnell & another, Respondents.

The case was signed "E. E., Judge of the County Court of Poole." The case was, by consent of the parties, argued in term (June 16) before the full court.¹

Udall, for the appellant. The only question raised for the consideration of the court of appeal, by the case which has been stated by the judge of the county court, is, whether the letter of the defendant J. Cawley, of the 25th of April, 1845, is a sufficient acknowledgment or promise within the meaning of the stat. 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations. The judge below has held that it was sufficient to take the case out of the Statute of Limitations, and has, consequently, given judgment for the plaintiff. It is submitted that his decision is wrong. The letter, though it acknowledges the existence of the debt, contains no promise to pay. It contains a direct assertion that the defendant cannot pay it. Such a letter does not take the case out of the statute. *Hart v. Prendergast*, 14 Mee. & W. 741; s. c. 15 Law J. Rep. (N. S.) Exch. 223. *Routledge v. Ramsay*, 8 Ad. & El. 221; s. c. 7 Law J. Rep. (N. S.) Q. B. 156. *Morrell v. Frith*, 3 Mee. & W. 402; s. c. 7 Law J. Rep. (N. S.) Exch. 172. *Tanner v. Smart*, 6 B. & C. 603; s. c. 5 Law J. Rep. K. B. 218.

[*Maule, J.* This case purports to have been stated by the judge; but it does not appear in the case that the parties could not agree in stating it. The judge has no business to state the case unless the parties have disagreed. It was so held in the Queen's Bench in a recent case.]

The case is duly signed by the judge.

[*Maule, J.* It may be that it has been signed by the judge, though the parties have not disagreed.]

The court will presume that it is regular.

[*Maule, J.* Will an appeal lie at all in this case, where the parties have left the facts and the law to the judge? This question was considered in *The East Anglian Railways Company v. Lythgoe*, 20 Law J. Rep. C. P. (N. S.) 84; s. c. 2 Eng. Rep. 331.

Jervis, C. J. By the stat. 13 & 14 Vict. c. 61, no appeal at all is given where the amount of the debt is under 20*l*. Is there any appeal where the facts and the law are not separated? The defendant might have had the facts decided by a jury.]

To limit the appeal to jury cases will be to make the right of appeal professed to be given by the statute nearly illusory. In this case, the law stands clear from the facts. There is nothing but a question of law in dispute; and that question is, whether the case shows that there was a sufficient promise in law to take the case out of the Statute of Limitations.

Barstow, for the respondent. No appeal lies in a case like the present. The facts and the law are not separated. The court has no jurisdiction to review the decision of the county court judge on a

¹ *Coram Jervis, C. J., Maule, Cresswell, and Talfour, JJ.*

Cawley, Appellant; Furnell & another, Respondents.

mixed question of fact and law. The defendant might have had a jury, had he wished to preserve his right of appeal. *The East Anglian Railways Company v. Lythgoe* puts the right construction on the statute. Secondly, assuming that the court will entertain the case, it is submitted that the judge below was right in his law, and that the letter takes the case out of the Statute of Limitations. It contains an acknowledgment of the debt. The law will imply a promise to pay. Thirdly, the letter is not the only evidence to take the case out of the statute. There was an account stated between the plaintiffs and the defendants in 1844, and that took place which in point of law amounted to payment. A balance was then struck. The case was tried in 1850. The date of the commencement of the plaint is not shown in the special case, nor does it appear in what time in 1844 the account was stated. It is true that it was not shown conclusively that the account stated was within the six years before the commencement of the action; but there was evidence from which the judge might infer that it was. This court cannot review his decision on the question of fact.

[*Cresswell, J.* It is stated that the cause of action was a claim in respect of goods sold and delivered in 1842. The action being for a sum exceeding 20*l.*, could not have been brought before the 14th of August, 1850, when the County Courts Extension Act passed. The demand, consequently, was more than six years old; and the *onus*, therefore, lay on the plaintiff to prove affirmatively that the account was stated in that part of 1844 that was within the six years from the commencement of the action. The case does not show that.]

Suppose the fact was, that the witness who proved the stating the account could only say that the account was stated in 1844, but that he could not say in which month of the year, there would be evidence from which the jury might infer that it was within the six years.

[*Cresswell, J.* I think not. Besides, it is evident that that statement of account was not within the time, because, if there had been a payment within the six years, the other question as to the effect of the letter would have become unimportant.]

It may be that the judge below wished to raise the point as to the effect of the adjustment of the account as a part payment. *Ashby v. James*, 11 Mee. & W. 542; s. c. 12 Law J. Rep. (n. s.) Exch. 295, shows that it was a part payment. *Clark v. Alexander*, 8 Scott, N. B. 147; s. c. 13 Law J. Rep. (n. s.) C. P. 133, and *Worthington v. Grimsditch*, 7 Q. B. Rep. 479, bear on this point. Unless the court can see that the judge below must necessarily have been wrong in point of law, this court cannot, it is apprehended, review his decision.

Udall replied, and referred to *Smith v. Page*, 15 Mee. & W. 683.

Cur. adv. vult.

MAULE, J., now delivered judgment. This was an appeal from the County Court of Dorsetshire. The case was tried without a jury, by the judge of the county court, who gave judgment for the plain-

Cawley, Appellant; Furnell & another, Respondents.

tiffs. The special case, which was stated by the judge, showed that the debt claimed was proved or admitted, and that the defendant relied on the Statute of Limitations as a defence. The question argued before us, and which appeared to have been raised before the judge of the county court also, was, whether the facts stated in the special case took the case out of the Statute of Limitations. The judge thought it did, and gave judgment for the plaintiffs.

A point, which had occurred to me in a former case as one of difficulty, was raised by the counsel in this, namely, whether an appeal lay at all from the decision of a judge of a county court, when neither party had required a jury, and it had been left to the judge to decide on the facts and the law together, these, moreover, not being separated by any pleadings. The solution of that question must depend upon the construction which is to be put on sect. 14 of the last County Courts Act, the 13 & 14 Vict. c. 61, which provides that if either party in any cause "of the amount to which jurisdiction is given to the county courts by this act" — which is the case here — "shall be dissatisfied with the determination or direction of the said court in point of law or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster, two or more of the puisne judges whereof shall sit out of term as a court of appeal for that purpose." The present case does not at all arise upon the admission or rejection of evidence. The question is, What is comprehended within the meaning of the words "determination or direction of the court in point of law"? The section clearly does not give an appeal to all parties who are dissatisfied with the judgment of the court on every ground, but it is only when the dissatisfaction is with the determination or direction in point of law. Now, there is a determination in point of law when the court has nothing but law to determine, as when a question is raised upon demurrer or upon a special verdict, and though those proceedings do not exist in a county court *eo nomine*, yet similar proceedings must take place in substance. For, suppose a party were to make a claim in a county court which, on his own showing, was one which in point of law could not be sustained, — as, for instance, if he made a claim for a sum of money as due to him upon a voluntary promise without consideration, and the opposite party were to object that such a claim could not be sustained in point of law, — or, on the other hand, if the defendant, in answer to a claim for a debt, were to rely as a defence upon the fact that the cause of action did not accrue within three years, the determination of the court upon each of these questions would be a determination in point of law. The term "direction" applies when the cause is tried by a jury, and the judge lays down to them a proposition as a matter of law; as, for instance, that a certain interest cannot pass except by instrument under seal. In these cases, an appeal is given. But where the parties do not choose to separate the law from the facts at all, but leave the judge to determine both together, it may be very much doubted whether the parties do not exempt themselves from the words and spirit of this enactment. It is often very desirable that a decision should be without

Cawley, Appellant; Furnell & another, Respondents.

appeal. In the ordinary case of an arbitrator who is to put an end to all controversies between the parties, it has long been settled that his decision on the facts or law cannot be impugned; and it may be that, when the parties leave the facts and the law to the judge, they may be considered as intending to put him in the situation of an arbitrator. It is objected that on such a construction the statute really gives no appeal. But the objection may be answered by using the words of the section in their reasonable import, and putting upon them the limited meaning, that the court of appeal should have before them a case in which the law and facts are separated. It may, notwithstanding, be possible that a line may be drawn which will not exclude every case in which the judge proceeds without a jury, and yet the facts before him are not admitted.

It may be, if it appears upon the case sent up to the court of appeal by the judge of the county court, or agreed upon by the parties, that the decision of the judge can be sustained by a particular view of the facts which does not render it necessary to conclude that he has decided the particular point of law in the way complained of as erroneous, that the court of appeal will have no power of reviewing the judgment; yet, when it is manifest from the facts of the case that the judge, in order to arrive at his judgment, must have decided a certain matter of law in a certain way, that that will be a determination in point of law with respect to which an appeal will lie. So that, suppose there be a judgment that can be sustained consistently with the law by any view that may be taken of the facts stated, such a judgment, probably, cannot be reversed; yet still, where the judge states the facts that were before him, and those facts can sustain his judgment upon one view of the law only, and that view be incorrect, the court of appeal may have jurisdiction to entertain an appeal against it. It was insisted that this case falls within the latter description of cases, and it appears to us that it does. We cannot see how the judge can reasonably have come to the conclusion at which he has arrived without holding a wrong view of the law. If we are wrong in assuming jurisdiction to give judgment for the appellant, as we do, our judgment may be reviewed in an action. As we entertain an opinion favorable to the appellant in point of law, we shall give judgment in his favor.

I may observe, that this is a very peculiar court indeed. This is not the Court of Common Pleas, but a court composed of two or more puisne judges of that court, sitting as a court of appeal for the purpose of hearing appeals from the county courts. The court may determine the appeal, and may order a new trial as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order as to costs as it thinks proper, and its orders are to be final. It is a court from which the chief justices are excluded, and which has an incapacity of sitting in term time. It is difficult to find a precise analogy for the proceedings of such a court. What comes nearest to this is the power given to two or more judges to reverse the decisions of the tax commissioners, in which case, instead of giving judgment at length, it is customary to state simply

Doe d. Hopkinson & others v. Ferrand.

that the judges are of opinion that the decision below is wrong. The legislature seem rather to have guarded against the decisions of the court being much regarded, as the statute precludes the court from having the great advantage of the assistance of the chief justices. We, therefore, think it convenient not to introduce the practice of giving the reasons for our judgments. For, though the custom has long prevailed, where the judges have considered any case of importance, that they have given reasons for the opinions which they have formed, the judgment itself consists only of a few formal words, whatever the reasons may be. Such, however, being the enactment of the legislature, we shall abstain from giving our reasons at all. The observations that I have made are with reference to the question of our jurisdiction to entertain the appeal. We assume that we have jurisdiction in this instance. With respect to the merits of the case, the learned puisne judges who have heard this case with me concur with me in thinking that the judge below was wrong. We, therefore, order judgment to be entered for the defendant. We make no order with respect to the costs of the appeal.

Judgment for the appellant, the defendant below.

DOE d. HOPKINSON & others v. FERRAND.¹

Trinity Term, May 30, 1851.

Power — Lease — Fine or Foregift — Waste — Covenant — Exception — License by Implication — Stat. Marlbridge, 52 Hen. 3, c. 23.

Tenant for life, punishable for waste, had power to lease for twenty-one years certain ancient pasture land, which she afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium, or foregift being taken for the making thereof" and that "none of the lessees should be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for waste." In a lease, reciting this power, the tenant for life demised, on the 13th of December, 1845, the premises for twenty-one years from the 1st of July last, reserving a rent payable half yearly on the 1st of January and the 1st of July, the first payment to be made on the 1st of January, 1846. The lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system," introduced by the tenant for life:—

Held, first, that such reservation of rent did not amount to a fine, premium, or foregift.

Secondly, that the exception in the covenant did not amount to a license or authority to the lessee to commit waste by carrying out the allotment system; and that, if any implication could be made so as to construe that exception as implying a permission to the lessee to do any thing, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as she had power to permit it, and not otherwise.

Semble, such an exception introduced into a covenant not to commit waste, even if it amounted to an implied authority to commit waste, is not a "special license had by writing of covenant," within the meaning of the Statute of Marlbridge, 52 Hen. 3, c. 23.

¹ 20 Law J. Rep. (N. S.) C. P. 202.

Doe d. Hopkinson & others v. Ferrand.

EJECTMENT. First count, upon a demise, by Hopkinson and Turner, on the 1st of July, 1846, of hereditaments at Bingley, in the county of York.

Second count, upon a demise, by Henry and Thomas Moss, of the same date, of other hereditaments, at the same place.

Plea — Not guilty. Issue thereon.

At the trial, before Cresswell, J., at the York Summer assizes, 1848, a verdict was taken by consent for the lessors of the plaintiff, subject to a special case.

The special case stated that the lessors of the plaintiff in the first count were the devisees in trust under the will of Walker Ferrand, deceased, dated the 4th of December, 1834; and the lessors of the plaintiff in the second count were the trustees named in the marriage settlement of the said W. Ferrand and Margaret Moss, dated the 7th of January, 1829.

The said W. Ferrand, up to and on the 7th of January, 1839, was seized in fee of the premises in the declaration mentioned, consisting of a house and buildings called "Myrtle Grove," and several closes particularized in the marriage settlement, consisting principally of park and pasture land, the whole called the "Myrtle Grove estate." Being so seized, W. Ferrand, by the said indenture of the 7th of January, 1829, conveyed that estate to Henry and Thomas Moss (the lessors of the plaintiff in the second count) in fee, to the use of himself and his heirs until the marriage, then to the use of himself and his assigns for life, without impeachment of waste, remainder to the use of the said Margaret Moss and her assigns for life, without impeachment of waste, remainders over to their issue, &c., remainder to the use of W. Ferrand in fee.

That indenture contained the following proviso: "Provided always, and it is hereby further agreed and declared, that it shall and may be lawful to and for the said W. Ferrand, from time to time during his life, and, after his decease, then to and for the said Margaret Moss during her life in case she shall survive him, and from and after the decease of both of them, for the said Henry and Thomas Moss, or the survivor of them, or the heirs of such survivor, to demise or lease all or any part or parts of the hereditaments and premises hereby granted and released, or intended so to be, with the appurtenances, to any person or persons, for any term or number of years not exceeding twenty-one in possession, and not in reversion or by way of future interest, so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents to go along with, and be incident to, the immediate reversion or remainder of the premises so to be leased that can or may be reasonably had or gotten for the same, *without taking any fine, premium, or foregift for the making thereof.* And so that none of the lessees to whom any such lease or leases shall be made be, by any clause or words therein contained, *authorized to commit waste, or exempted from punishment for waste,* any thing herein contained to the contrary notwithstanding."

The marriage took place, and Walker Ferrand died on the 20th of

Doe d. Hopkinson & others v. Ferrand.

September, 1835, without issue, having by his will of the 4th of December, 1834, made Hopkinson and Turner (the lessors of the plaintiff in the first count) and his wife his executors, and left his estate to them upon trust to permit her to receive the rents during her life.

Almost the whole of the land mentioned in the indenture of 1829 had been pasture time out of mind.

The testator's widow, Margaret Ferrand, from the death of the testator for some time resided on the estate, managing it entirely, and receiving the rents.

In 1844 and 1845, Margaret Ferrand converted a great part of the ancient pasture land (being the land in the declaration mentioned) into upwards of eighty separate garden allotments, which she allotted to several poor laborers as yearly tenants, who broke up the ground and used it for gardening purposes, growing vegetables, and occasionally corn, thereon.

By indenture of the 13th of December, 1845, between Margaret Ferrand and the defendant, *reciting the indenture of the 7th of January, 1829*, Margaret Ferrand demised to the defendant the whole Myrtle Grove estate, "to hold the same from the first day of July then last past, for and during and unto the full end and term of twenty-one years, at the yearly rent of 347*l.*, payable half yearly on the 1st of January and the 1st of July, the first payment to be made on the 1st of January then next, clear of all deductions, except property and income tax." And the said indenture of lease contained, amongst other covenants by the said William Busfield Ferrand, a covenant in the following words: "And shall not, nor will, at any time or times during the said term hereby granted, plough, break up, or convert into tillage any part or parts of the pasture or meadow lands hereby demised, *except for the purpose of carrying out the allotment system introduced by the said Margaret Ferrand.*" It was admitted, for the purposes of this case, that the rent of 347*l.* per annum was the best and most improved yearly rent which, at the time the lease was granted, could be reasonably had or gotten for the hereditaments comprised in the lease, without a fine, premium, or foregift for the making thereof, and that no fine, premium, or foregift was taken for the making of the said lease, unless the making of the said lease on the 13th of December, to commence from the 1st of July then last past, and the circumstances afterwards mentioned with respect to the payments of the rents of the said estate, amount to, or constitute, the taking of a fine, premium, or foregift for the making thereof.

Margaret Ferrand went to Paris in December, 1845, and died there on the 5th of April, 1846.

The facts stated with regard to the payment of the rents of the estate were, that before and at the time of the making of the lease of the 13th of December, 1845, the estate was occupied by yearly tenants, whose rents were due, as regarded the house, on the 30th of May and the 23d of November, and, as regarded the land, on the 1st of January and the 1st of July. The rents which fell due on the 23d of November, 1845, and the 1st of January, 1846, were paid by the

Doe d. Hopkinson & others v. Ferrand.

tenants to Margaret Ferrand's steward, who had been in the habit of receiving them, and were by him paid over to the defendant.

[The rest of the case is omitted, as the points raised were not much discussed, and the decision does not turn upon them.]

Tomlinson, (*Watson* and *J. Henderson* with him,) for the lessors of the plaintiff. The first ground upon which it is contended that the lease is void is, that the lease being dated in December, 1845, the first rent is made payable on the 1st of January, 1846, so that the lease reserves a half-year's rent for an enjoyment of less than a month. It is, therefore, void. *Doe d. Wilmot v. Giffard*, cited in *Doe d. Earl of Shrewsbury v. Wilson*, 5 B. & Ald. 371, and in Sugden on Powers, 6th edit. p. 427, vol. 2.

[*Cresswell*, J. The objection there was, that no rent would be payable under the lease from the 25th of March preceding the expiration of the term on the 14th of September. That is not the case here.]

In *Doe d. Harries v. Morse*, 2 Cr. & M. 247; s. c. 3 Law J. Rep. (n. s.) Exch. 70, where there was a power to lease reserving rent by half-yearly payments, and the lease, dated the 11th of January, to hold from the 4th of January preceding, reserved rent payable not half yearly, but on the 1st of May and the 29th of September, the lease was held void.

[*Cresswell*, J. On the ground that the remainder-man might be prejudiced. Bayley, B., says, "Suppose the tenant for life to live till the 30th of September, he would obtain the half-year's rent due on the 29th; and if the *cestui que vie* die on the 4th of January, no rent will be payable to the remainder-man for the occupation from the 30th of September." That is not a decision that the case was one of fine or foregift.]

In *Isherwood v. Oldknow*, 3 M. & S. 382, which might appear against the plaintiff upon this point, the decision turned upon the circumstance that the payment was in consideration of an occupation preceding the date of the lease.

[*Maule*, J. Is there any case which sustains the position that where a rent is reserved payable half yearly on two certain days, and the first payment is to be made on the latter of those days, the lease being dated on an intermediate day, but to hold for twenty-one years from the former of the days, that amounts to a fine or foregift?]

The case of *Doe d. Harries v. Morse* is an authority to that effect.

[*Maule*, J. No; the decision there was on the ground that the rent was not reserved half yearly, which was a breach of the condition in the power, and might work a prejudice to the remainder-man. He referred to *Doe d. Wythe v. Rulland*, 10 Cl. & F. 419.]

Secondly, the lease is void, as containing a clause authorizing the lessee to commit waste. It will be conceded on the other side, that the carrying out of the allotment system, described in the case and referred to in the lease, amounts to waste. [This was admitted.] The restricting clause in the power to lease provides "that none of the

Doe d. Hopkinson & others v. Ferrand.

lessees be by any clause or words in the lease contained authorized to commit waste or exempted from punishment for waste." The lease contains a clause, by which the lessee covenants that he will not "plough, break up, or convert into tillage any of the pasture lands demised during the term, except for the purpose of carrying out the allotment system introduced by Margaret Ferrand." That is an express authority to the lessee to commit waste, or, at least, an exemption from punishment for waste.

[*Maule, J.* Margaret Ferrand, the tenant for life, was dispunishable for waste, so that during her life she was authorized to carry out the allotment system. Then, it may be that she could not expressly authorize the defendant to carry out the allotment system even during her time; but has she done so? There is no authority, in terms, to carry out the allotment system. The effect of the proviso may be merely that the lessee makes no covenant with the tenant for life with regard to the allotment system, but is bound by his covenants to other persons to commit no waste.]

An action of covenant might be maintained by the lessor upon such an exception as that contained in this clause. *Cole's Case*, 1 Salk. 196. At all events, it might be pleaded by the lessee to an action of waste by the lessor. *Young v. Wallaston*, Hardr. 113, pt. 2. Com. Dig. tit. "Pleader," 3, O, 14. He also cited Com. Dig. tit. "Waste," D, 4. *Simmons v. Norton*, 7 Bing. 640; s. c. 9 Law J. Rep. C. P. 185. *Phillipps v. Smith*, 14 Mee. & W. 589; s. c. 15 Law J. Rep. (N. S.) Exch. 201. *Doe d. Martin v. Watts*, 7 Term. Rep. 83.

Unthank, (Knowles and Crompton with him,) for the defendant. The first point is already disposed of by the observations of the court. Secondly, there is no authority to commit waste, or exemption from punishment for waste, contained in the lease. The lessor was not bound to make the lessee enter into a covenant not to commit waste; it is sufficient if the lease is within the terms of the power; and the plaintiff must make out affirmatively that there is any violation of those terms. In order to see whether there is any exemption from punishment for waste in the clause in question, we must look to the statutes concerning waste. The Statute of Marlbridge, 52 Hen. 3, c. 23, says, "Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special license had by writing of covenant making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously." This lease certainly contains nothing amounting to a special license by writing of covenant making mention that the lessee may commit waste. Therefore, under that statute, the lessee is punishable for waste, notwithstanding any thing in this lease contained, and that statute is still in force, although the remedy given by the Statute of Gloucester, 6 Edw. 1, c. 5, is repealed by 3 & 4 Will. 4, c. 27, s. 36. *Greene v. Cole*, 2 Wms. Saund. 252, a. n. (g.) It is said that under this covenant it is to be implied that the lessor covenants that she will

Doe d. Hopkinson & others v. Ferrand.

permit the lessee to commit waste during the whole of his term, if he does it in carrying out the allotment system. But the contrary intention appears. The lease recites the restriction as to authorizing waste, contained in the power to lease, and the court will not construe the covenant so as to avoid the lease, when it may be construed so as to make it valid, but will look to the intention of the parties as appearing upon the lease itself. *Wolveridge v. Steward*, 1 Cr. & M. 644; s. c. 3 Law J. Rep. (N. S.) Exch. 360, shows that, though no words were necessary to constitute a covenant, it lies upon the party relying on a covenant to show affirmatively that a covenant was intended. Here the intention merely was, that, during the particular tenancy of Mrs. Ferrand, the allotment system should not be interfered with. She was punishable for waste; but there is nothing amounting to a covenant on her part that the defendant shall be punishable if he commits waste.

[*Maule, J.* Suppose the words of the covenant had been "shall not break up the pasture except for the purpose of carrying out the allotment system, for which purpose he may," no doubt that would have been an authority to commit waste; yet, are not the last words a mere pleonasm? The strong point for the defendant is, that the leasing power, with its restrictions, is inserted in the recital.]

He also cited *Doe d. Coore v. Clare*, 2 Term. Rep. 739. *Hayward v. Haswell*, 6 Ad. & El. 265; s. c. 6 Law J. Rep. (N. S.) K. B. 116. Roll. Abr. tit. "Covenant," C, 52, 53. *Aspdin v. Austin*, 5 Q. B. Rep. 671; s. c. 13 Law J. Rep. (N. S.) Q. B. 155. *Dunn v. Sayles*, Ibid. 685; s. c. 13 Law J. Rep. (N. S.) Q. B. 159. *Wood v. Copper Miners Company*, 7 Com. B. Rep. 906; s. c. 18 Law J. Rep. (N. S.) C. P. 293. *Duke of St. Alban's v. Ellis*, 16 East, 352. *Doe d. Marquis of Bute v. Guest*, 15 Mee. & W. 160.

Tomlinson, in reply. It is not necessary to contend that there is an express covenant on the part of the lessor to allow the lessee to commit waste. It is enough if a qualification is introduced into the covenant of the lessee not to commit waste, which amounts to an authority or license to him to commit waste. That is the case here.

[*Maule, J.* The Statute of Marlbridge says, that the fermor is not punishable "without special license had by writing of covenant."]

This is such a writing of covenant, and the express exception of the allotment system amounts to a special license to commit waste in carrying out that system. The Latin words of the statute are not quite correctly translated, "nisi specialem inde habuerint concessionem, sive conventionis mentionem, adeo quod hoc facere possint."

[*Maule, J.* Suppose you were to insert the words "for which purpose I authorize you to do it," must you not imply that they mean "for any purpose for which I may lawfully allow you to do it"?]

Jervis, C. J. I am of opinion that the verdict should be entered for the defendant. In substance, there is one point only for the

Doe d. Hopkinson & others v. Ferrand.

consideration of the court. It is almost admitted that the lease is not void by reason of its containing any express stipulation for a payment by way of fine or foregift; but it is suggested, that the reservation of a rent, payable after so short a period of occupation, might be so calculated as to amount to a fine. But the authorities cited have none of them proceeded upon that principle. The point is only glanced at; the principle upon which the cases have been decided has been that the limitation in those particular powers, requiring the rent to be payable half yearly, has not been followed; and, then, if the power has not been strictly followed, another question arises, namely, whether the lease is as beneficial to the reversioner as if the power had been strictly followed. If so, it may be said in substance to be in due execution of the power. Then comes the second and more important point. It is said, here is a leasing power, with a condition that the lease is to contain no authority to the lessee to commit waste, nor exemption from punishment for committing waste; and it is admitted that ploughing up ancient meadow land, as it has been ploughed up, amounts to waste; and it is contended that there is by implication in this lease an authority given to commit this kind of waste, and, therefore, that the lease is void, as not following the conditions of the leasing power. Now, it is not necessary to decide whether the license required by the Statute of Marlbridge could be satisfied by such an implied covenant as that contended to exist here. It may be that the license to commit waste required by that statute must be an express covenant in writing, made for the purpose; but in this case the lease sets out the power, and the lessor in effect may be taken to say, "Although I may have another legal remedy, if you commit waste, I will have an additional remedy;" a covenant is therefore inserted, that the lessee shall not commit waste. But, then, the lessor is so anxious to carry out the allotment system introduced by her, that she will not prevent the lessee, during her time, from carrying out that system. She says, "I will have something, in addition to the remedy under the statute, to prevent you from committing waste except for that special purpose; but I will not make that covenant extend to the allotment system." The covenant has nothing enabling in it. Or it may be taken in this way: "I am, during my lifetime, dispunishable for waste; I will take care to prevent you from ploughing up ancient pasture land, either in my lifetime, or at any other time during the the lease; but I will not, by an express covenant, put it in my power, during my own lifetime, to prevent you from ploughing up ancient pasture for the purpose of the allotment system." If we are to infer any thing in this case, we should look at the situation of the parties; and that being so, I think the inference is this: the covenant against waste was inserted, with this exception of the allotment system, in order to put it out of the power of the lessor, *during her lifetime*, to object to the carrying on that system, but not with the intention of authorizing it any longer. The lease would have been good without any covenant against waste at all. It seems to me, therefore, that the lease may be well construed so as not to be inconsistent with the leasing power, and that it is not void.

Doe d. Hopkinson & others v. Ferrand.

MAULE, J. I am of the same opinion. The other points have been disposed of in the course of the argument. With respect to the second question, whether this lease is void on account of not complying with the condition in the leasing power that the tenant shall not be made dispunishable for waste, I think the case is more arguable; but, on consideration, I am of opinion that the lease is not void for any such reason. The lease is granted by a tenant for life, herself dispunishable for waste; and it was granted in respect of pasture and meadow land, the breaking up of any part of which would have amounted to waste. This lease contains a clause which it is contended makes the lease void, as amounting to a license to break up such pasture and meadow land. [He read the clause.] Now, these words themselves are in terms an exception out of a covenant on the part of the lessee; and, if treated strictly as such, they would clearly have no more operation in enabling the tenant to commit waste than if the whole covenant, together with the exception, had been left out of the lease. The introduction of the exception might be considered as an erasing from the covenant of that which had been previously contained in it, as far as the subject matter of the exception is concerned. But if the exception were all erased, there being clearly nothing enabling in the rest of the covenant, there is no doubt that the lease would contain no violation of the terms of the power. But it is said that the clause containing the words "except for the purpose of carrying out the allotment system," must be by construction interpreted as if it had gone on and permitted that to be done which is the subject of the exception. Now, suppose we do imply from those words power to do any thing, that implication must certainly be qualified by what is frequently held to qualify even express terms, namely, by restricting the words to those things which may lawfully be done by the party who is considered as speaking in the clause. Therefore, if any implication is to be made here, it appears to me that it cannot be made to extend further than this, that the lessor permits the breaking up for the purpose of the allotment system, so far as she has power to permit it. In all cases of implication, I conceive that such a restriction may be introduced, either for the purpose of making the instrument generally lawful, or lawful in respect of the exercise of the particular power upon the due exercise of which the validity of the instrument depends; as if a license or order, or direction to do a certain class of things, is to be implied from any instrument, it must be always subject to the condition, that the things done are not contrary to the general law, or, I think, such things as that a license to do them would render the instrument void. Introducing that kind of implication here, which, I think, is as much as we can introduce, the effect will be that, during such time as Mrs. Ferrand can lawfully allow the breaking up of pasture land for the particular purpose mentioned, she does allow it; but not afterwards. In fact, she does not in terms allow it at all; but if we are to imply it at all, I do not think we can reasonably infer that she was usurping a power which she clearly had not, and inserting in the lease an authority which it would be in violation of her leasing power to

& others v. Fenning.

It was agreed that the lender should forbear maritime to be recoverable whether the vessel arrived at

that the lender had no insurable interest.

[Ves. 443, fully stated and commented upon.]

At of the declaration stated, that whereas the name and style, description, and Son," heretofore, to wit, on the 1st of the usage and custom of merchants, policy of insurance, purporting thereby, the said plaintiffs, as well in their own name and names of all and every other the same did, might, or should appertain assurance and cause themselves, and them, insured, lost or not lost, at and from Quebec in the United Kingdom, upon any kind of goods, and also upon the body, tackle, apparel, artillery, boats, and other furniture, of and in the "Hartland," whereof was master, &c., be upon the said goods and merchandises from the said ship, upon the said ship, &c., and so endure during her abode upon the said ship, &c., said ship, with all her ordnance, tackle, apparel, and merchandises whatsoever, should be arrived at the said ship, &c., until she had moored at anchor in good safety, and upon the goods and merchandises the same should be there discharged and safely it should be lawful for the said ship, &c., in the said and sail to, and touch and stay at, any ports or wharves and wheresoever, without being deemed a deviation without prejudice to the said insurance. The said ship, merchandises, &c., for so much as concerned the assured, by between the assured and assurers in that policy, were and 500*l.* advances for repairs and disbursements, and the at 167*5**l.*, including premium of insurance. Touching the perils and perils which they, the assurers, were contented to did take upon them, in that voyage, they were of the seas, war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and countermarque, reprisals, takings at sea, arrests, restraints, detentions of all kings, princes, and people of what nature, condition, or quality whatsoever, barratry of the master and mariner, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assignees, to sue, labor, and travel, for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to that insurance, to the charges whereof they, the assurers, would contribute,

Stainbank & others v. Fenning.

insert, and which would avoid the lease which the parties clearly intended should not be void. I think, therefore, looking at the state of things appearing to have existed at the time of the lease and at the recitals of the lease itself, that the true construction of it excludes the supposition that it contains any power granted by the lessor to the lessee to commit any species of waste, except so far as might lawfully be done without any violation of the leasing power.

CRESSWELL, J. I agree. No express agreement is to be found in the lease that the lessee shall be punishable for waste. And the plaintiff's counsel has not contended that the lessee is by any express words authorized to commit waste. But he resorts to the supposition that other words may be lawfully added from which a license to commit waste may be implied. Now, undoubtedly this clause in the lease, which is a covenant by the lessee not to break up ancient pasture, except for the purposes of the allotment system, cannot be considered a special license to commit waste within the meaning of the Statute of Marlbridge, unless it is an authority to commit waste such as would avoid the lease. But we must look at what the lessor professed to be doing and intended to do. Is it to be supposed that she intended the lease so to operate as to enable the lessee to commit waste during the whole operation of the lease? Would it be reasonable to suppose it, when that construction would make the instrument void? If any words are to be added to explain the meaning of the clause, I should say that its full meaning would be this: "I leave you to your rights, except when restricted by covenant. I bind you by covenant not to commit waste; but if a twenty-one years' lease will enable you to carry out the allotment system, I allow it. If otherwise, I say nothing about it."

TALFOURD, J., concurred.

Judgment for the defendant.

STAINBANK & others v. FENNING.¹

Trinity Term, May 8, 9, and 30, 1851.

*Ship and Shipping — Master — Hypothecation — Form of Instrument
— Maritime Risk — Insurable Interest — Loan.*

The master of a ship has no authority to hypothecate the ship for money advanced for repairs, unless the payment of the money borrowed is made to depend upon the arrival of the ship; nor can he pledge the ship itself and the personal credit of the owners.

Where the master of a ship, having borrowed money for repairs, gave the lender bills on the owner of the ship and on the consignee of the cargo for the amount, and also an instrument by which he purported to hypothecate the vessel, &c., and stipulated that, in case the bills were not accepted or paid, the lenders might take possession, and sell, under process

¹ 20 Law J. Rep. (N. S.) C. P. 226.

Stainbank & others v. Fenning.

of the Admiralty Court, and in which it was agreed that the lender should forbear maritime interest, and that the advances were to be recoverable whether the vessel arrived at its port of destination or not:—

Held, that the instrument was void, and that the lender had no insurable interest.

[The case of *Samson v. Bragginton*, 1 Ves. 443, fully stated and commented upon.]

ASSUMPSIT. The first count of the declaration stated, that whereas the plaintiffs, by and under the name and style, description, and firm of "C. Stainbank & Son," heretofore, to wit, on the 1st of December, 1846, according to the usage and custom of merchants, caused to be made a certain policy of insurance, purporting thereby, and containing therein, that the said plaintiffs, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause themselves, and them, and every of them, to be insured, lost or not lost, at and from Quebec to a final port of discharge in the United Kingdom, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boats, and other furniture, of and in the good ship or vessel called the "Hartland," whereof was master, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c., and so should continue and endure during her abode upon the said ship, &c., and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, should be arrived at (as above) upon the said ship, &c., until she had moored at anchor twenty-four hours, in good safety, and upon the goods and merchandises until the same should be there discharged and safely landed, and that it should be lawful for the said ship, &c., in the said voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, without being deemed a deviation, and without prejudice to the said insurance. The said ship, goods, merchandises, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be 1500*l.* advances for repairs and disbursements, and the whole valued at 1675*l.*, including premium of insurance. Touching the adventures and perils which they, the assurers, were contented to bear, and did take upon them, in that voyage, they were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and countermarque, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nature, condition, or quality whatsoever, barratry of the master and mariner, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assignees, to sue, labor, and travel, for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to that insurance, to the charges whereof they, the assurers, would contribute,

Stainbank & others v. Fenning.

each one according to the rate or quantity of his sum therein assured, &c. [The declaration then set out other stipulations in the policy, and proceeded.] That the said policy of insurance and memoranda were so made by the plaintiffs as aforesaid, as the agents of J. Gilmour, D. Gilmour, A. Gilmour, of Montreal, James Gilmour, J. Pollock, A. Pollock, Allen Gilmour, of Glasgow, and R. Rankin, and for their use and benefit, and that the plaintiffs did receive the order for, and effect the said policy of insurance as such agents as aforesaid, of all which premises the defendant afterwards, to wit, on the 1st of December, A. D. 1846, had notice; and thereupon, in consideration that the plaintiffs, at the request of the defendant, had then paid to the defendant a certain sum of money, to wit, the sum of twenty guineas, as a premium or reward for the insurance of 200*l.* of and in the premises in the said policy of insurance mentioned, and had then promised the defendant to perform and fulfil all things in the said policy contained, on the part and behalf of the insured to be performed and fulfilled, the defendant then promised the plaintiffs that he would become and be an insurer to the plaintiffs of the said sum of 200*l.* upon the premises in the said policy of insurance mentioned on his part and behalf as such insurer of the said sum of 200*l.*, to be performed and fulfilled, and the defendant then became and was an insurer to the plaintiffs, and then duly subscribed the said policy of insurance, as such insurer, for the sum of 200*l.*, upon the premises in the said policy in that behalf mentioned. And the plaintiffs say that the said J. G., D. G., A. G., of Montreal, J. G., J. P., A. P., A. G., of Glasgow, and R. R., some or one of them, were, or was then, and from thence continually afterwards until and at the time of the loss hereinafter mentioned interested in the premises in the said policy of insurance and memoranda mentioned, to a large amount, to wit, to the value and amount of all the moneys by them ever insured or caused to be insured thereon. And the plaintiffs say that heretofore, to wit, on the 25th of November, A. D. 1846, the said ship or vessel departed and set sail from Quebec aforesaid, on her said voyage to a final port of discharge in the United Kingdom, to wit, Bristol, and that afterwards, and while the said vessel was proceeding on her said voyage, and before her arrival at any final port of discharge in the said writing or policy of insurance mentioned, to wit, on the 27th of November, A. D. 1846, the said vessel was, by the perils and damages of the seas and by stormy and tempestuous weather, &c., driven on the shore, and thereby and by means of the premises became bulged, broken, &c., and the said ship then became and was wholly lost, and thereby the premises upon which the defendant became and was an insurer, as in the said policy mentioned, to wit, the said 1500*l.* advances, for repairs and disbursements, became wholly lost, of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay them the said sum of 200*l.* so insured by him as aforesaid, and which said sum of 200*l.* he, the defendant, ought to have paid according to the form and effect of the said policy of insurance and his said promise and undertaking so by

Stainbank & others v. Fenning.

him made as aforesaid. Yet the defendant hath disregarded his promise, &c.

Pleas — First, *non assumpsit*; second, that the said policy so made by the plaintiffs was not made by them as agents for the said persons in the said count in that behalf mentioned for their use and benefit, in manner and form, &c.; third, that the said persons in the said first count in that behalf alleged were not, nor were nor was any or either of them, interested in the premises in the said policy and memoranda mentioned in manner and form, &c.; fourth, that the said ship was not lost in manner and form, &c.; fifth, that the premises upon which the defendant became and was an insurer, as in the said policy and first count in that behalf mentioned, were not, nor was any part thereof, lost in manner and form as in the said first count alleged.

At the trial, before Platt, B., at the Liverpool Spring assizes, 1850, the following facts were proved: On the 20th of September, 1846, the Hartland sailed from Quebec for Bristol. Having sustained damage, she put back to Quebec in a few days afterwards; and the master then borrowed of Allen Gilmour & Co., the plaintiffs' principals, for necessary repairs and disbursements, the sum of 1675*l.* 11*s.* 6*d.*, to secure which he drew upon the owner of the ship for 1307*l.* 12*s.* 1*d.* and upon the consignee of the cargo for 367*l.* 19*s.* 5*d.*, giving to Allen Gilmour & Co., at the same time, an instrument under his hand and seal, upon the construction of which the first point in the case mainly depended.

This instrument, after reciting the damage sustained by the Hartland, the necessity of the advances made by Allen Gilmour & Co. upon condition of their being secured by an hypothecation of the ship, cargo, and freight, the delivery to Allen Gilmour & Co. of two bills of exchange by the master upon the owners of the ship and the consignee of the cargo, proceeded thus: "Now know ye, that for the effectually securing to the said Allen Gilmour & Co. the due and punctual acceptance and payment of the said bills of exchange so drawn by me, the said George Hooper, one of which on the said William Hooper for the sum of 1307*l.* 12*s.* 1*d.*, and the other on the said R. Mead & Son, for the said sum of 367*l.* 19*s.* 5*d.*, for the causes and in the manner aforesaid, I, the said G. Hooper, have pledged, mortgaged, and hypothecated, and by these presents do, as master of the said bark or vessel called the Hartland, and in the said capacity, as master, by virtue of all other powers and authorities whatsoever me thereunto in any wise enabling, pledge, mortgage, charge, and hypothecate the said bark or vessel called the Hartland, her tackle, apparel, and furniture, and the freight of the said vessel and every part thereof, to the said A. Gilmour & Co., their executors, administrators and assigns, but including with respect to the said bill on the said W. Hooper the cargo on board, the said expenses being incurred for the benefit of the ship, freight, and cargo. And I, the said G. Hooper, as such master as aforesaid, do hereby grant, testify, and declare, that in case the said bills of exchange shall be refused acceptance or payment, or otherwise dishonored, or not duly and punctually

Stainbank & others v. Fenning.

accepted and paid by the said W. Hooper and the said R. Mead & Son, on presentment for the said purpose, according to the tenor and effect thereof, it shall and may be lawful to and for the said A. Gilmour & Co. forthwith to seize and take possession of the said bark, the Hartland, and to cause the same to be sold and disposed of, either by virtue of process to be issued out of her majesty's High Court of Admiralty of England, or any court of vice admiralty possessing jurisdiction at the port at which the said bark or vessel may at any time thereafter happen to be lying, or to be according to the maritime law and custom of England. And I, the said G. Hooper, as such master as aforesaid, do, by these presents, testify, declare, and make known that I took up and borrowed of the said A. Gilmour & Co. the said sums of money on the credit and account of the owner of the said bark, the Hartland; and do, so far as in me lies as master as aforesaid, grant and declare that it shall and may be lawful to and for the said A. Gilmour & Co. to place the same to the debit and account of the owner of the said bark, and in case of the non-acceptance or non-payment of the said bills of exchange, the said A. Gilmour & Co. shall, and lawfully may have, use, and take all such lawful ways and means whatsoever for the recovery of the said sum of money, or such part or parts thereof as may at any time or times hereafter remain due or unpaid, as merchants or other persons in a foreign port or other port out of the kingdom of Great Britain, advancing money at the instance of a master of a ship or vessel for the repairs, outfits, and disbursements thereof, to enable such ship or vessel to proceed on her homeward bound voyage on the credit and account of such ship or vessel, and her owner can, or lawfully may have, use, or take for the recovery thereof, against such ship or her owner or master."

With a view to identify the owner of the vessel, the instrument proceeded to set out a copy of the certificate of registry, showing that the Hartland had been previously mortgaged, and then concluded with the following agreement: "And it is declared and agreed by and between me, the said G. Hooper, and the said A. Gilmour & Co. that inasmuch as the said A. Gilmour & Co. forbear any claim, premium, or maritime interest upon the risks of the said sums of money so advanced as aforesaid, that the voyage of the said bark shall be at the sole risk and peril of the owner of the said bark or vessel, the Hartland; and that, therefore, whether the ship arrive in safety or not, or in the event of shipwreck or loss of the same by the act of God, accident, or the queen's enemies, the said sums shall, in either or in any case, be recoverable, and be paid by the owner of the said bark to the said A. Gilmour & Co. or to their order as aforesaid, together with such further sum or sums of money as they may pay or lay out in causing the said bark or freight to be insured, should they think proper so to do, in an amount sufficient to cover the advances by them made as aforesaid, and which insurance the said A. Gilmour & Co. by these presents, by me, the said G. Hooper, are authorized and empowered to cause to be done and made, and charge the same to me and the owner of the said bark. And it is further agreed and declared, that

Stainbank & others v. Fenning.

the said A. Gilmour & Co. shall and will have all the rights, privileges, and remedies by process of the courts of admiralty and otherwise, which by law are given to the holders of bottomry bonds, any thing herein contained to the contrary notwithstanding. And, lastly, it is agreed and declared that the said vessel, her tackle, apparel, furniture, and her freight and cargo, shall at all times hereafter be chargeable and liable for the payment of the said sums of money advanced to enable the said bark to proceed on her voyage, and the costs of insurance as aforesaid unto the said A. Gilmour & Co., their executors, &c., according to the true intent and meaning of these presents."

A verdict was found for the plaintiffs, with 200*l.* damages, and leave was reserved to the defendant to move to enter a nonsuit.

A rule *nisi* having been obtained accordingly,—

Knowles and *Atherton* (8th and 9th of May, 1851) showed cause.¹ The first question in this case is, whether the plaintiffs had an insurable interest in the instrument produced at the trial. That instrument is not an ordinary bottomry bond, because bottomry interest is excluded, but it is an instrument of hypothecation; and the master having power to hypothecate for necessities, did so by this instrument, and thereby gave to the plaintiffs an interest in the ship which could be insured. The intention was, that there should be no bottomry interest, but that, in addition to the security of the bills, the parties lending the money should have an interest in the ship if the bills were not accepted or paid, and a right to pursue their remedy in the Court of Admiralty. Although the document be not in the ordinary form of an hypothecation, there is no authority to show that any particular form must be adopted, or that this form is bad. "Hypothecation" is defined in *Abbott on Shipping*, p. 366, ed. 144, as importing a pledge without immediate change of possession; and is treated in the books as equivalent to pawning. *Cossart v. Lawdley*, 3 Mod. 244. *Corset v. Husely*, Comb. 135. *Bridgeman's Case*, Hob. 11. *Scarreborrow v. Lyrius*, 1 Noy, 95. It is submitted that where, by express agreement, or by law independent of agreement, the ship is a pledge in respect of a debt, that is hypothecation. In this country, in the case of necessities, there must be an express agreement; but even here, as to mariners' wages, there is hypothecation by law. By the maritime law, every contract in respect of a ship creates an hypothecation. *Justin v. Ballam*, 2 Ld. Raym. 805; s. c. 1 Salk. 34. *Abbott on Shipping*, p. 142. Bottomry is only one species of hypothecation, and there is no authority for saying that a ship may not be hypothecated in another way. It is also submitted that the instrument was one which it was within the master's power to give to the plaintiffs. In *Samsun v. Bragginton*, 1 Ves. 443, it was held that a master might pledge the ship for expenses, and also make the owners liable. It will be contended on the other side that as the money was to be paid at all events, and there was no maritime risk, the instru-

¹ There were four questions raised on the argument; but as judgment was pronounced on the first only, the facts and arguments with respect to the others are omitted.

Doe d. Hopkinson & others v. Ferrand.

that the judges are of opinion that the decision below is wrong. The legislature seem rather to have guarded against the decisions of the court being much regarded, as the statute precludes the court from having the great advantage of the assistance of the chief justices. We, therefore, think it convenient not to introduce the practice of giving the reasons for our judgments. For, though the custom has long prevailed, where the judges have considered any case of importance, that they have given reasons for the opinions which they have formed, the judgment itself consists only of a few formal words, whatever the reasons may be. Such, however, being the enactment of the legislature, we shall abstain from giving our reasons at all. The observations that I have made are with reference to the question of our jurisdiction to entertain the appeal. We assume that we have jurisdiction in this instance. With respect to the merits of the case, the learned puisne judges who have heard this case with me concur with me in thinking that the judge below was wrong. We, therefore, order judgment to be entered for the defendant. We make no order with respect to the costs of the appeal.

Judgment for the appellant, the defendant below.

DOE d. HOPKINSON & others v. FERRAND.¹

Trinity Term, May 30, 1851.

Power — Lease — Fine or Foregift — Waste — Covenant — Exception — License by Implication — Stat. Marlbridge, 52 Hen. 3, c. 23.

Tenant for life, punishable for waste, had power to lease for twenty-one years certain ancient pasture land, which she afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium, or foregift being taken for the making thereof," and that "none of the lessees should be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for waste." In a lease, reciting this power, the tenant for life demised, on the 13th of December, 1845, the premises for twenty-one years from the 1st of July last, reserving a rent payable half yearly on the 1st of January and the 1st of July, the first payment to be made on the 1st of January, 1846. The lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system," introduced by the tenant for life:—

Held, first, that such reservation of rent did not amount to a fine, premium, or foregift.

Secondly, that the exception in the covenant did not amount to a license or authority to the lessee to commit waste by carrying out the allotment system; and that, if any implication could be made so as to construe that exception as implying a permission to the lessee to do any thing, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as she had power to permit it, and not otherwise.

Seemle, such an exception introduced into a covenant not to commit waste, even if it amounted to an implied authority to commit waste, is not a "special license had by writing of covenant," within the meaning of the Statute of Marlbridge, 52 Hen. 3, c. 23.

¹ 20 Law J. Rep. (N. S.) C. P. 202.

Doe d. Hopkinson & others v. Ferrand.

EJECTMENT. First count, upon a demise, by Hopkinson and Turner, on the 1st of July, 1846, of hereditaments at Bingley, in the county of York.

Second count, upon a demise, by Henry and Thomas Moss, of the same date, of other hereditaments, at the same place.

Plea — Not guilty. Issue thereon.

At the trial, before Cresswell, J., at the York Summer assizes, 1848, a verdict was taken by consent for the lessors of the plaintiff, subject to a special case.

The special case stated that the lessors of the plaintiff in the first count were the devisees in trust under the will of Walker Ferrand, deceased, dated the 4th of December, 1834; and the lessors of the plaintiff in the second count were the trustees named in the marriage settlement of the said W. Ferrand and Margaret Moss, dated the 7th of January, 1829.

The said W. Ferrand, up to and on the 7th of January, 1839, was seized in fee of the premises in the declaration mentioned, consisting of a house and buildings called "Myrtle Grove," and several closes particularized in the marriage settlement, consisting principally of park and pasture land, the whole called the "Myrtle Grove estate." Being so seized, W. Ferrand, by the said indenture of the 7th of January, 1829, conveyed that estate to Henry and Thomas Moss (the lessors of the plaintiff in the second count) in fee, to the use of himself and his heirs until the marriage, then to the use of himself and his assigns for life, without impeachment of waste, remainder to the use of the said Margaret Moss and her assigns for life, without impeachment of waste, remainders over to their issue, &c., remainder to the use of W. Ferrand in fee.

That indenture contained the following proviso: "Provided always, and it is hereby further agreed and declared, that it shall and may be lawful to and for the said W. Ferrand, from time to time during his life, and, after his decease, then to and for the said Margaret Moss during her life in case she shall survive him, and from and after the decease of both of them, for the said Henry and Thomas Moss, or the survivor of them, or the heirs of such survivor, to demise or lease all or any part or parts of the hereditaments and premises hereby granted and released, or intended so to be, with the appurtenances, to any person or persons, for any term or number of years not exceeding twenty-one in possession, and not in reversion or by way of future interest, so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents to go along with, and be incident to, the immediate reversion or remainder of the premises so to be leased that can or may be reasonably had or gotten for the same, *without taking any fine, premium, or foregift for the making thereof.* And so that none of the lessees to whom any such lease or leases shall be made be, by any clause or words therein contained, *authorized to commit waste, or exempted from punishment for waste,* any thing herein contained to the contrary notwithstanding."

The marriage took place, and Walker Ferrand died on the 20th of

Stainbank & others v. Fenning.

lowing appear to be the facts of that case: Bragginton and Pitman were part owners of the Dunsley galley, of which Pitman was master. On her homeward voyage she was disabled and put into Jamaica, where Pitman applied to the plaintiff to advance the necessary funds for her repairs, "for the use and on account of himself and Bragginton as owners," and as a further inducement engaged with the plaintiff, as additional security for the repayment of the money, to hypothecate the ship. The plaintiff repaired the ship, expended for that purpose 80*l.*, and at his request Pitman drew upon Bragginton for that amount, and by way of additional security, as master of the ship, according to maritime usage in like cases, by deed poll, after taking notice of the damage and advance, did, for securing the payment of the said money, hypothecate to the plaintiff the ship, with the freight and cargo. The ship sailed from Jamaica, was captured and sold. Bragginton and Pitman received the insurance upon her loss, but Bragginton refused to accept the bills, and the plaintiff was not paid the amount which he had advanced for the repairs of the ship. Upon this statement, the plaintiff filed his bill against Bragginton and Nichols, the representative of Pitman, for repayment of the money advanced by him. Bragginton, by his answer, admitted the plaintiff's statement, but submitted that he was not liable to repay what Pitman might have paid for the repairs, because Pitman was indebted to him, and suggested that bottomry interest had been taken for the advance, and that, therefore, according to maritime custom, the lender took the risk of the voyage upon himself. There was no proof of this suggestion, and the master of the rolls decreed that the money advanced by the plaintiff in refitting the ship ought to be established against Bragginton and Nichols, according to their respective interest. It is not very apparent how, upon the bill and answer so framed, the validity of the hypothecation could come directly in question. The plaintiff did not seek to establish his claim by that instrument, because it did not profess to charge the owners personally with the debt, and the defendant Bragginton, failing to prove that bottomry interest had been taken, could not add to the deed, by implication, a condition that the repayment of the advances should depend upon the return of the ship. The decree seems to have proceeded on the ground that joint owners were liable for money advanced in a foreign country for necessary repairs. Whether the master had properly pledged the ship or not, the ship was lost, and the plaintiff was proceeding upon the present liability of the joint owners. The reporter states that his honor took time to consider, and afterwards (as he was informed) determined that the ship was well hypothecated, and that the part owners were liable. In Abbott on Shipping, the decree against the part owners is stated positively; but the learned author adds, cautiously, "It is said also that the ship was *thought* (not determined) to be well hypothecated." He does not give the full weight of his unqualified sanction to this proposition; and, upon examination, we think that this case is not to be considered as an authority conclusive against the more recent decisions to which reference has been made.

Stainbank & others v. Fenning.

The deed now in question only professes to give such an interest as can be enforced in the Admiralty Court. In certain events, A. Gilmour & Co. may seize the vessel and cause her to be sold by process out of the admiralty of England or any other court of vice admiralty possessing jurisdiction; and further, they are to have all the right, &c., by process of the courts of admiralty or otherwise, which by law are given to the holders of bottomry bonds. The interest which they have in the ship is the right of proceeding in the Admiralty Court against the ship; but if, under similar circumstances, the Admiralty Court would not act because it has no jurisdiction, A. Gilmour & Co. have not an available interest. Now, the cases show that, under circumstances like the present, the Court of Admiralty would decline to act. In the case of *The Atlas*, Lord Stowell refused to entertain a suit of bottomry because the advance was payable within thirty days after the arrival of the ship, "*or in case of the loss of the ship, then within thirty days next after the account of such loss should have been received in Calcutta or London.*" Upon appeal, the delegates decided that the bond was void because there was no sea risk to justify the taking of maritime interest, and so it became unnecessary to determine the principal question; but upon the argument of the question of jurisdiction, Hullock, B., observed that the condition destroyed the whole instrument. The more recent case of *The Emancipation* is an express authority upon the same point. There, upon the face of the bond, and according to legal inference, the payment of the money advanced did not depend upon the safe arrival of the ship, and for that reason the court pronounced against the bond. Upon these authorities, it is clear that, if the *Hartland* had arrived in this country, the plaintiffs could not have proceeded against her in the Admiralty Court; they had, therefore, no interest in the vessel; they have lost nothing, and upon this ground the defendant is entitled to succeed.

But without reference to authority we are of opinion, upon principle, that the master has not by an instrument of this nature authority to pledge the ship. By the Roman law, and still in those nations which have adopted the civil law, every person who had repaired or fitted out a vessel, or had lent money for those purposes, had a claim upon the value of the ship without a formal instrument of hypothecation; but by the law of England no such right can be acquired except by express agreement, and a master can only make such an agreement if he act within the scope of his authority. The right to raise money upon bottomry can only be justified by necessity. If the master in a foreign country wants money to repair or victual his vessel or for other necessities, he must, in the first instance, endeavor to raise it upon the credit of the owners. If he can do so, he has no authority to hypothecate the vessel; but if he cannot otherwise obtain the money, then he may hypothecate the ship, not transferring the property in the ship, but giving the creditor a privilege or claim upon it, to be carried into effect by legal process upon the termination of the voyage. As incident to this transaction, the lender may, if he think fit, insist upon maritime interest; but whether he do so or not, the advance is made upon the credit of the ship, not upon the credit

Abley v. Dale.

of the owners, and the owners are never personally responsible. There is no trace in our books, with the exception of *Samsun v. Bragginton*, of any case in which a master has been held to have authority to make a valid hypothecation of a ship, unless the payment of the money borrowed has been made to depend upon the arrival of the ship. There is, therefore, nothing to show that a master has authority to hypothecate in any other matter. Indeed, if the money be originally advanced upon the credit of the owner, and for any cause an hypothecation be made even before the ship leaves the place where the advances were made, the bond will be void, and cannot be enforced. *The Augusta*. For these reasons, we are of opinion that the master had no authority to make an instrument like that in question, and that by the instrument the lender possesses no interest in the ship. The money advanced for repairs was a mere debt from the owners to the lender, and it being admitted that a mere debt from the owners to the assured for repairs and disbursements could not legally be made the subject of an insurance, it follows that the defendant is entitled to judgment.

Rule absolute.

ABLEY v. DALE.¹

Trinity Term, June 13, 1851.

County Courts Act, 9 & 10 Vict. c. 95, s. 98, 99 — Unsatisfied Judgment — Discharge by Insolvent Court — Jurisdiction of County Court Judge.

The discharge by the Insolvent Court of a person against whom judgment for a debt has been obtained in a county court does not satisfy the judgment, and the judgment remaining "unsatisfied" within the meaning of the 98th section of the County Courts Act, (9 & 10 Vict. c. 95,) the party may be proceeded against by summons under that section, and may be committed by the judge under the provisions of sect. 99.

TRESPASS for false imprisonment.

At the trial, before Jervis, C. J., at the sittings after Easter term, it appeared that the action was brought for arresting the plaintiff under a warrant of commitment of the Whitechapel County Court of Middlesex, issued in a suit in which the now defendant and another were plaintiffs, and the now plaintiff was defendant. The clerk of the county court stated the practice to be, for the plaintiff in a suit to lodge the plaint note with the officer, on which the warrant is to issue, and that a warrant would not be executed unless the plaint note were so lodged. It further appeared that the plaintiff, before the commitment by the county court, had been discharged by the Insolvent Court. On behalf of the defendant, it was contended that there was no evidence to show that he had, directly or indirectly, interfered in obtaining or enforcing the warrant. The jury having found a verdict

¹ 20 Law J. Rep. (N. S.) C. P. 233.

Abley v. Dale.

for the plaintiff, the chief justice reserved leave to the defendant to move to enter a nonsuit.

A rule *nisi* for a nonsuit or a new trial having been obtained, —

Lush (May 1) showed cause. The County Courts Act, 9 & 10 Vict. c. 95, by the 98th section, enables any party who has obtained any unsatisfied judgment or order of the court to summon the party against whom it has been obtained; and the 99th section empowers the judge to commit such person, under certain circumstances, for any period not exceeding forty days. The meaning of the term "unsatisfied judgment or order" must be any judgment or order upon which there exists a legal remedy. There must be some judgment in existence on which the party is legally liable. By the provisions of the 99th section, the judge is to inquire into the reasons why the judgment has not been satisfied, or why instalments, if provided for in the judgment, have not been paid; but when it has been proved to him that since the order was made the party has been discharged by the Insolvent Act, he then ceases to have any jurisdiction over the matter. In the case of *Still v. Booth*, 1 L. M. & P. 440; s. c. 19 Law J. Rep. (N. S.) Q. B. 521, Coleridge, J., discharged out of custody a prisoner committed by a county court judge after discharge by the Insolvent Court. There is no great reason why the judge of the county court should have the power to commit under such circumstances, because, under the stat. 1 & 2 Vict. c. 110, an investigation takes place analogous to that which is provided for by the summons under the County Courts Act, and the insolvent must insert his debts in a schedule, and may be remanded from time to time, or may be committed, unless he makes a satisfactory disclosure of the manner in which his debts were contracted. By the same act, also, the insolvent's future property is made liable to the payment of his debts. In *Ex parte Purday*, 19 Law J. Rep. (N. S.) M. C. 95, though the question was not directly decided, Erle, J., said, "I think that the discharge by the Insolvent Debtors Court freed the defendant from all liability to pay the debt recovered by the judgment of the county court."

Hugh Hill, in support of the rule. Consistently with the evidence in the case, the defendant might have left the plaint note with the clerk, directing him to take the necessary steps, and all the subsequent proceedings might have been the act of the court.

[*Lush*. That would only be ground for a new trial, because, if the point had been made at the trial, it might have been answered by evidence.]

The words "unsatisfied judgment or order" must be construed, according to the strict legal meaning, to signify any judgment or order which has not been satisfied and extinguished. In the 103d section of the act it is provided, that no imprisonment under the act shall operate as a satisfaction or *extinguishment* of the debt. A discharge under the Insolvent Act does not operate as an extinguishment of the debt, but only of the remedy; and, in order to be taken advantage of, it must be pleaded. *Bircham v. Creighton*, 10 Bing. 11; s. c. 2 Law

Abley v. Dale.

J. Rep. (N. S.) C. P. 245. In *Phillips v. Shervill*, 6 Q. B. Rep. 944; s. c. 14 Law J. Rep. (N. S.) Q. B. 144, which was an action for an excessive distress, it appeared that the plaintiff had been discharged by the Insolvent Court, and had been opposed by the defendant in respect of rent due; and it was held, that, although the debt was extinguished as regarded his remedy by action, it was not so with respect to the remedy by distress. *Ford v. Dornford*, 8 Q. B. Rep. 583; s. c. 15 Law J. Rep. (N. S.) Q. B. 172, and *Francis v. Dodsworth*, 4 Com. B. Rep. 202; s. c. 17 Law J. Rep. (N. S.) C. P. 185, are authorities to a similar effect. As, therefore, the debt in this case was not satisfied or extinguished, the defendant was not deprived of his right to have the plaintiff committed to prison.

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.¹ Upon the trial of this case before me, one point, and one point only, was made for the defendant. It was contended that there was no evidence to show that he had, directly or indirectly, interfered in obtaining or enforcing the warrant. The jury found a verdict for the plaintiff, and I gave the defendant leave to enter a nonsuit if the court should think there was no evidence to be left to the jury upon this point. Upon considering the evidence, it appeared to the court that the verdict ought not to be disturbed upon the point made at the trial; but during the argument it was suggested, for the first time, that consistently with the evidence the defendant might have left the plaint note with the clerk, with directions to take the necessary steps, and that all the irregularity might have been the act of the court or of the clerk, without the defendant's knowledge or participation. It was admitted, that, under such circumstances, the defendant would not be liable in trespass if the court had jurisdiction, but it was urged that this point, at most, could only entitle the defendant to a new trial; because, if made at the trial, it might have been answered by further evidence. It was further contended, that the county court judge had no jurisdiction to commit after the discharge by the Insolvent Court, and so the defendant would be liable in trespass, and the verdict must stand. The point thus raised is of great importance, and is attended with much difficulty. It depends upon the true meaning of the word "unsatisfied" in the stat. 9 & 10 Vict. c. 95, s. 98. Although the point has been raised, it has not been expressly decided after argument in banc. In *Ex parte Purday*, the discharge by the Insolvent Court was after the order for commitment by the county court, and my brother Erle, refusing an application for a writ of *habeas corpus* upon various grounds, was "inclined to think, that, taking the facts as stated, the discharge by the Insolvent Court freed the defendant from all liability in respect of the debts recovered by the judgment of the county court." In *Still v. Booth*, the order for payment and committal was made by the county court, after the defendant had been discharged by the Insolvent Court, and upon this ground my brother Coleridge, at chambers, discharged the defendant,

¹ JERVIS, C. J., CRESSWELL, WILLIAMS, and TALFOURD, JJ.

Abley v. Dale.

whereas in the same case an application having been made to set aside a writ of prohibition issued from the petty bag office, my brother Wightman observed that he did not see that there was, in point of fact, any defect of jurisdiction at all, but at most an erroneous exercise of his powers by the county court judge, which would perhaps entitle the defendant to his discharge from the imprisonment. In this state of the law, unaided by authority, we must endeavor to put a construction upon the word "unsatisfied" in connection with the words "judgment or order," as used in the 98th section of the act. It was contended, for the plaintiff, that it was, under the circumstances, absurd to give the county court a concurrent jurisdiction; that it was unjust to allow the county court judge to commit, for the non-payment of a particular debt, a debtor whose whole case had been considered by a competent tribunal, and who had been discharged; and that adopting to the full extent the rule so frequently referred to as the golden rule by which judges are to be guided in the construction of acts of Parliament, we ought to look at the precise words of the statute, and construe them in their ordinary sense only, if such construction would not lead to any absurdity or manifest injustice; but if it would, then we ought so to vary and modify the words used as to avoid that which it certainly could not have been the intention of the legislature should be done. It certainly does seem to be manifestly unjust to commit, for the non-payment of a particular creditor, a man whose whole property is transferred by order of a competent court to an assignee, for the equal benefit of all his creditors. And many may think it absurd that a coördinate authority should be given to the insolvent commissioners and the judge of the county court, and that the latter should have the power to commit for an act which the commissioner, with the same jurisdiction, may have punished by his remand, or adjudged to be venial by an immediate and absolute discharge — an absurdity which is in no respect diminished by the recent transfer of the jurisdiction of the insolvent commissioners in certain cases to the judges of the county court. But we cannot adopt this rule to the full extent to which it is pressed. If the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure; but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning. The discharge of an insolvent debtor does not, in any view of the case, of necessity, satisfy the judgment or order, and take away the jurisdiction of the county court in every instance. *Ex concessis*, where a judgment, if it had been in a superior court, might have been enforced against the person of an insolvent, the judge of a county court has jurisdiction under the 98th section of the stat. 9 & 10 Vict. c. 95. Instances are mentioned in the 90th section of the Insolvent Act, 1 & 2 Vict. c. 110, in which judgment in the superior courts may be so enforced; and as

Richardson v. The South-eastern Railway Company.

each judgment or order of the county court may come within this class, the judge of the county court has jurisdiction to issue his summons to inquire into this matter, and, having jurisdiction, if he make an erroneous order upon that summons and commit the defendant, the plaintiff will not be responsible in trespass for the mistake of the judge. But, independently of this view of this case, the judgment or order is not satisfied by the discharge of the insolvent. The person of the debtor is protected, and the judgment or order cannot be enforced by law upon the debtor's goods; but the debt remains, and may ultimately be satisfied, through the medium of the Insolvent Court, from the present or subsequently acquired property of the debtor. To commit a debtor under such circumstances, for non-payment of a particular creditor, and thus obtain indirectly, by imprisonment, what cannot be had by direct means, is, except under very special cases, manifestly unjust; but cases may occur, though rarely, in which the exercise of such a power would be justified, and it is not impossible that the legislature may have supposed that a discretion upon this subject might safely be intrusted to gentlemen who were to discharge the important duties of local judges. But, without speculating upon the motives of the legislature, we are not at liberty to depart from the plain meaning of the words used, and, therefore, are of opinion that the judge had jurisdiction to commit in this case. There ought, therefore, to be a new trial, but it should be upon payment of costs, because the point was not made at the trial.

Rule absolute for a new trial upon payment of costs.

RICHARDSON v. THE SOUTH-EASTERN RAILWAY COMPANY.¹

Trinity Term, June 10, 1851.

Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18 — Compensation — Jury — Costs — Sects. 38 and 51 incorporated in Sect. 68.

The 68th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, by which any party entitled to compensation in respect of lands taken or injuriously affected by the execution of works may give notice of his claim to the promoters, and the claimant may have the matter settled by a jury, incorporates all previous sections which are applicable, and among others the 38th, which requires the promoters to give notice of the amount of compensation they are willing to pay, before summoning the jury, and also the 51st, which gives the claimant the costs of the inquiry when he recovers more than the sum offered by the promoters.

Conflicting with *Railstone v. The York, Newcastle, and Berwick Railway Company*, 19 Law J. Rep. (N. S.) Q. B. 464.

DEBT. The declaration stated, that before and at the time of the giving the notice hereinafter mentioned, and after the passing of the Lands Clauses Consolidation Act, 1845, and after the passing

¹ 20 Law J. Rep. (N. S.) C. P. 236.

Richardson v. The South-eastern Railway Company.

of the Railways Clauses Consolidation Act, 1845, and after the passing of a certain other act of Parliament made and passed in the session of Parliament holden in the 9th and 10th years of her present majesty, intituled, "An Act to make a Railway from the London and Greenwich Railway to Woolwich and Gravesend," the plaintiff was seized of the inheritance in fee simple in possession of an estate situate and being in Marshall's Grove, Woolwich, in the county of Kent, and adjoining the south side of the said railway authorized to be constructed, and constructed by the defendants, under and by virtue of the provisions of the said last-mentioned act, consisting of nine messuages or cottages, with the gardens and yards in the rear thereof, and being No. 1 to No. 9 inclusive, in the said Marshall's Grove. That by reason of the last-mentioned railway having intersected and cut off the road-way adjoining the north side of the said estate of the plaintiff, and having thereby destroyed or obstructed the immediate approaches thereto, and also by the execution of the works by the said last-mentioned act authorized to be executed, and by the construction of the said last-mentioned railway, the said estate of the plaintiff was greatly damaged and injuriously affected.

That before the giving of the said notice hereinafter next mentioned, to wit, on the 1st of January, 1849, the defendants took possession of, and used, and converted to the purposes of their aforesaid railway, or the works connected therewith, a piece of ground at the north-east angle of one of the aforesaid messuages or cottages, by reason whereof the said estate of the plaintiff was further greatly damaged and injuriously affected, and the plaintiff, by reason of the several premises aforesaid, sustained a loss and claimed to be entitled to compensation in respect thereof from the defendants, to an amount exceeding 50*l.*, to wit, to the amount of 1000*l.* That afterwards the plaintiff, being so interested in the said estate, and the same being so injuriously affected as aforesaid, and the plaintiff having sustained such loss as aforesaid, and being so entitled to compensation in respect thereof as aforesaid, and being desirous of having the question of compensation settled by a jury, to wit, on the 9th of March, 1850, he, the plaintiff, did give a notice in writing to the defendants, and did thereby and therein state to the defendants the said nature of his interest in the said hereditaments, in respect of which he claimed compensation, and that he claimed from the defendants compensation in respect of the said loss and injury, and that 1000*l.* should be paid by the defendants to him, the plaintiff, for such compensation; and the plaintiff did also, by the said notice, state to the defendants that it was the desire of him, the plaintiff, that the question of the aforesaid compensation should be settled by a jury, in the manner pointed out in that behalf by the Lands Clauses Consolidation Act, 1845, unless the defendants should be willing to pay the aforesaid amount of 1000*l.* as compensation, which the plaintiff thereby claimed, and enter within the time limited by the said statute in that behalf into an agreement for that purpose.

That the defendants afterwards, to wit, on the 20th of March, 1850, gave to the plaintiff a certain notice in writing, whereby, after

Richardson v. The South-eastern Railway Company.

reciting the said notice so given by the plaintiff to the defendants as aforesaid, they, the defendants, made known to the plaintiff that they, the defendants, were ready and willing, and thereby offered to pay to the plaintiff the sum of 60*l.* in satisfaction and discharge of the injury and damage alleged to have been sustained by the plaintiff, and in respect of which the said sum of 1000*l.* was so claimed by the plaintiff as aforesaid. That the defendants did not, nor would, pay the amount of compensation so claimed by the plaintiff as aforesaid, nor did, nor would, enter into a written agreement for that purpose. That the defendants, within twenty-one days of the receipt of the said first-mentioned notice to them so given as aforesaid, to wit, on the 28th of March, 1850, did, according to the form of the first-mentioned statute, issue their certain warrant in writing, under the common seal of the defendants, and directed to the sheriff of the county of Kent, whereby, after reciting and referring to the several notices aforesaid, the defendants, pursuant to the powers and authorities given to them by the statutes in that behalf, required the said sheriff to nominate and summon a special jury, to inquire of and assess the compensation, if any, to be paid to the plaintiff in respect of the several supposed matters in his said notice alleged, or any of them, in respect whereof he had therein claimed compensation; and the defendants did, by their said warrant, further require the said sheriff to issue such summons, and do all such things in relation to the said trial or inquiry, as were authorized and required to be done by the Lands Clauses Consolidation Act, 1845, and by the said company's act.

And the plaintiff avers that afterwards, to wit, on the 24th of April, 1850, within the said bailiwick of the said sheriff, to wit, at Woolwich, in the county of Kent, a certain inquisition was taken in pursuance of, and in accordance and compliance with, the last-mentioned request, before Matthew Ball, Esq., then being sheriff of the said county of Kent, T. R. Cutbush, Esq., &c., twelve honest, lawful, sufficient, and indifferent men of the said county, qualified to serve on juries for trials of issues in her majesty's courts of record at Westminster, who were duly impanelled, summoned, returned, and drawn, pursuant to the provisions of the statute in that behalf, by the said M. Ball, at the time of the said request, and then being sheriff of the said county of Kent as aforesaid, and who were by and before such sheriff, at the time and place last aforesaid, duly sworn to inquire of and concerning the matters in the said warrant in that behalf mentioned, and thereby referred to be inquired of, assessed, ascertained, and determined by them in manner therein mentioned; and the plaintiff and the said defendants, by their counsel respectively, having, at the time and place of holding of the said inquisition, appeared before the said sheriff and the said jurors, touching the matters so in question as aforesaid, the said jurors, upon their oath, did find their verdict that the plaintiff had sustained damages to the amount of 215*l.*, by means of the several matters mentioned in his said notice, and that the defendants should pay to the plaintiffs the said sum of 215*l.*; and the said sheriff did then and there accordingly,

Richardson v. The South-eastern Railway Company.

pursuant to the statute in that behalf, give judgment for the said sum of 215*l.* so assessed by the said jury to be paid by the defendants to the said plaintiff according to the provisions of the said statutes, and the said verdict and judgment were then and there, to wit, at the time and place of holding the said inquisition as aforesaid, duly signed by the said sheriff.

And the plaintiff avers that the said verdict and judgment, being so duly signed as aforesaid, were afterwards and before the commencement of this suit, to wit, on the 1st of May, 1850, duly deposited and left by the said sheriff with the clerk of the peace of the said county of Kent, to be by him kept, and the same are now by him kept, among the records of the Quarter Sessions of the said county of Kent, and the said verdict and judgment still remain in full force and effect, and in no wise satisfied, reversed, or annulled. That the said sum of 215*l.*, for which the verdict of the jury was so given as aforesaid, was and is a greater sum than the said sum of 60*l.* so previously offered by the defendants as aforesaid, by reason whereof the defendants became and were liable to pay the plaintiff his, the plaintiff's, costs of the said inquiry. That afterwards and before the commencement of this suit, to wit, on the 1st of June, 1850, the plaintiff's costs of the said inquiry were settled by R. Goodrich, then being one of the masters of the Court of Queen's Bench at Westminster, at a certain sum, to wit, the sum of 243*l.* 1*s.* 3*d.*, of all which the defendants afterwards and before the commencement of this suit, to wit, on the day and year last aforesaid, had notice, by reason of which said premises, and by force of the statutes in that behalf, an action has accrued to the plaintiff to demand and have of and from the defendants the said sum of 215*l.*, and also the said sum of 243*l.* 1*s.* 3*d.*, amounting in the whole to the sum of 458*l.* 1*s.* 3*d.*

Plea as to so much of the declaration as relates to the said sum of 215*l.*, payment into court.

General demurrer as to the residue of the declaration and joinder therein.

Channell, Serj., in support of the demurrer. The question which arises on this demurrer is, whether the plaintiff is entitled to the costs of the inquiry under the Lands Clauses Consolidation Act, 1845, having recovered by the verdict of the jury a larger sum than was offered to him by the railway company as compensation. It is submitted that the 68th section of the act 8 & 9 Vict. c. 18, under which the inquiry took place, makes no provision for costs, and cannot be taken as incorporating the previous sections of the act, which refer to the question of costs. That section provides that if any party shall be entitled to compensation in respect of lands which shall have been taken or injuriously affected by the execution of works, and for which the promoters of the undertaking shall not have made satisfaction, and if the compensation claimed exceed 50*l.*, the party may have it settled either by arbitration or by the verdict of a jury. If the claimant desire to have the question settled by a jury, it shall be lawful for him to give notice in writing of his desire to the

Richardson v. The South-eastern Railway Company.

promoters, and unless they be willing to pay the amount claimed and to enter into a written agreement for that purpose, they shall within twenty-one days issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default they shall be liable to pay the amount claimed, with costs. Now, the manner provided in the act for settling claims of compensation is pointed out by sect. 38 and the following sections. The 38th section provides that before the promoters of an undertaking shall issue their warrant for summoning a jury to settle any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention, and in the notice shall state what sum they are willing to give for the interest in the lands "sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works." The act then proceeds to provide for the summoning of the jury and impanelling them and for taking the inquiry, and the 51st section then enacts that "on every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking." Now, all the sections, from the 38th to the 51st, apply to prospective takings and damage, and to proceedings in which the promoters take the initiative, and not to cases like those under the 68th section, which refer to land already taken, and damage already done, and proceedings taken by the claimant; and without language which would necessarily show that it was the intention to give costs under the latter section, it cannot be said to incorporate the former ones. [The object and effect of the 68th section, which was introduced for the purpose of avoiding the necessity for a *mandamus*, are commented upon by the lord chancellor in the case of *The London and North-western Railway Company v. Smith*, 19 Law J. Rep. (N. S.) Chanc. 193.] In the case of *Railstone v. The York, Newcastle, and Berwick Railway Company*, Ibid. Q. B. 464, it was held that the 38th section does not apply to cases where land has been already taken and damage done, and that in such cases, which fall under sect. 68, it is not necessary to give the ten days' notice required by sect. 38. The 51st section, therefore, which refers only to proceedings under the 38th, is not applicable to proceedings under the 68th section.

[*Jervis*, C. J. In the case cited, Coleridge, J., said he did not feel quite satisfied, and made some strong observations in his judgment as to the incorporation of the 38th section in the 68th.]

Butt, (*Hugh Hill* with him,) contra. The plaintiff is entitled to the costs, for the 68th section must be taken to incorporate all previous sections applicable to the subject matter, and among others the 38th and 51st sections. If it were not so, the promoters of an undertaking would only have to lie by, and claimants would then be liable to pay their own costs. It cannot be said that the 68th section incorporates the previous provisions as to the jury, and yet does not incorporate that which refers to costs. In the case in the Queen's

Richardson v. The South-eastern Railway Company.

Bench, cited in support of the demurrer, the reasons given by Coleridge, J., for differing from the rest of the court are deserving of great weight. Besides, in that case the question of costs was not mooted, the point at issue being whether when a claimant had given notice, under the 68th section, of his desire to have the claim settled by a jury, the company was obliged to give a ten days' notice to him under the 38th section.

[*Maule, J.* The 68th section says that the jury is to be summoned for settling the claim "in the manner herein provided," but it is not necessary to rely on these words to show that the previous sections are incorporated. The language of the other sections is sufficient to have that effect. Sect. 38 speaks of "*any* case of disputed compensation;" sect. 39 provides for a warrant for summoning a jury in case of "every such question of disputed compensation;" and sect. 51 provides for costs on "every such inquiry before a jury."]

Channell, in reply. If the plaintiff's case rests upon the ground that the 68th section incorporates the 38th, that is directly at variance with the decision of the Queen's Bench. If it be taken by itself, it certainly does not give the right to costs. With regard to the 51st section, "every such inquiry" must refer to cases under the 38th section, where the taking and damage were prospective.

JERVIS, C. J. The plaintiff by his declaration claims two sums of money, the one being compensation in respect of his land, awarded to him by a jury, and the other being the amount of the costs of the inquiry, the plaintiff alleging that he recovered a larger sum than he had claimed from the defendants. The defendants have paid the first sum into court, and demur to so much of the declaration as relates to the other. I am of opinion that the plaintiff is entitled to costs, and that our judgment should, therefore, be for him on this demurrer. This was the state of things. If the defendants had instituted the proceedings, they must have given notice to the plaintiff under the 38th section of the act; and in that case they would have been obliged to pay the costs. It is plain, too, that if the plaintiff had claimed compensation, and the defendants had failed to issue their warrant for a jury within twenty-one days, they must have paid the costs under sect. 68. These, therefore, were two cases in which the defendants were liable to costs; and it would be strange if, in the third case, where they have issued their warrant, and the plaintiff has recovered a larger sum than they had offered, they should not be obliged to pay the costs. If this had been a *casus omisus*, the consequences, however unjust, must have followed. But if the court think it would be unjust and absurd to construe the language of the act so as to deprive the plaintiff of his costs, and the words be open to a construction which will avoid such injustice and absurdity, the court will adopt that construction. I think that the words of the act will bear such a meaning, and that the court may hold that the words "in manner herein provided," in the 68th section, do incorporate the previous provisions. But, looking to the language of the 38th and

Richardson v. The South-eastern Railway Company.

39th sections, I find plain words which apply to *any* case of disputed compensation. I quite feel that this view of the case does, to a certain extent, conflict with the decision of the Queen's Bench; but it is to be observed that the court was not unanimous, and that my brother Coleridge pointed out, in his judgment, many inconveniences which might result from the decision. There is no reason why the plaintiff should not have taken advantage of the 54th section of the act, and had a special jury to settle the amount of compensation; but if the construction contended for on behalf of the defendants were to be adopted, the 54th section would apply only to cases where the proceedings have been commenced under the 38th. In my opinion, therefore, the plaintiff is entitled to the judgment of the court.

MAULE, J. I am of the same opinion. I think that the act of 8 & 9 Vict. c. 18, is an act which provides a number of general regulations to be applied to all cases in which they may be applicable, in respect of railways established by acts of Parliament to be subsequently passed. With respect to the mode of proceeding, certain rules are given to be applied to railways constructed afterwards, and there is a considerable number of sections which refer to the settlement of disputed claims for compensation, by arbitration or by the finding of a jury. These rules are couched in general terms, and are not restrained to particular cases; they extend not to arbitration only, but also to settlements by the verdict of a jury. The 38th section is one of these; and it provides that before the promoters of the "undertaking" — (and that by the interpretation clause, sect. 3, means the works or undertaking of whatever nature which shall by the special act be authorized to be executed) — issue their warrant for summoning a jury, for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party. Then the 68th section says, that in every case where the party entitled to compensation for lands taken or damage done wishes to have a jury, the company, on notice, shall issue their warrant. Now, the case in which the company was to issue their warrant is provided for by sect. 38, which applies to all cases of that description; so that sect. 38, without the assistance of any such words as "in the manner herein provided," which occur in the 68th section, would apply to the present case. I think, therefore, that the 38th section is incorporated in the 68th. Looking at the terms of the 68th section, we see that it applies not only to compensation for injuries done to the land, but also to claims for the land itself, in which case the notice required by the 38th section is distinctly applicable. If it were necessary to have recourse to the words "in the manner herein provided," I think they must be taken necessarily to imply all the applicable details before mentioned. It is quite competent for the legislature to use words of reference after words of general application. Though the words of reference are not absolutely necessary, they serve to make persons reading the act look back to the previous provision. I do not think we ought to restrain these words, as was contended for by

Hare v. Fleay.

my brother Channell, and hold them to refer only to so much of the foregoing provisions as must necessarily be incorporated. I think we must read them as incorporating so much as is properly applicable. This decision does, perhaps, in some degree, conflict with that of the Queen's Bench in the case relied on for the defendants; but at the same time the reasons given by my brother Coleridge, differing from the other judges, seem to me to be of great weight. I think, therefore, that the plaintiff was entitled to the costs of the inquiry, and ought to have judgment on this demurrer.

CRESSWELL, J. I am entirely of the same opinion. After a very minute examination of the different sections of the act, I see nothing which should exclude a claimant under the 68th section from getting his costs.

TALFOURD, J. I am of the same opinion, and for the same reasons as have been already assigned.

Judgment for the plaintiff.

HARE v. FLEAY.¹

Trinity Term, June 2, 1851.

Arbitration—1 & 2 Vict. c. 110, s. 18—Practice—Motion to enforce Award.

All matters in difference in the cause were referred by a judge's order. The award, dated the 14th of January, 1851, directed the defendant to pay 100*l.* "to the plaintiff, or to S., his attorney." A rule nisi was obtained, before the expiration of the next term, for an order, under 1 & 2 Vict. c. 110, s. 18, upon the defendant to pay to the plaintiff, or to S., his attorney:—

Held, that the application was not too early, although the time for moving to set the award aside had not expired; and, per Maule, J., that so long as an award is subject to a motion in the nature of a motion in arrest of judgment, the court will not enforce it; otherwise, if it be subject only to a motion in the nature of a writ of error:—

Held, also, that the direction to pay to the plaintiff, or to S., his attorney, did not vitiate the award; and that, upon a rule in that form, under the 1 & 2 Vict. c. 110, s. 18, the plaintiff only, and not the attorney, could issue execution.

This court will follow the established practice of granting rules to pay pursuant to the award, in cases in which the court would grant an attachment, notwithstanding the doubt expressed in *Creswick v. Harrison*, 15 Jur. 108; s. c. 1 Eng. Rep. 384.

In this case an order had been made on the 23d of November, 1850, by Williams, J., after issue joined, and before trial, referring all matters in difference in the cause to an arbitrator, the costs of the cause, of the reference, and of the award to abide the event. The arbitrator, by his award, dated the 14th of January, 1851, found for the plaintiff on all the issues, and that there was due from the defendant to the plaintiff, at the commencement of the suit, 100*l.*, which

¹ 15 Jur. 1038.

Hare v. Fleay.

sum he directed the defendant to pay "to the plaintiff, or to Mr. Dalton Serrell, his attorney," and 1s. damages, at Serrell's office in Gray's Inn, on the 1st of February following. The order of reference was made a rule of court, and the costs taxed at 97*l.* 16*s.* Serrell, on the 11th of March, served the defendant with the award, the rule of court, and the master's *allocatur*, and demanded of him payment of the principal debt and the costs, both which sums the defendant refused to pay, and it was sworn that he had not since paid them to Serrell or to the plaintiff, or to any one on their behalf. A rule was obtained on the 10th of May, the term not ending till the 13th, calling on the defendant to show cause why he should not pay to the plaintiff, or to his attorney, the sums of 100*l.* 1*s.* and 97*l.* 16*s.*; against which

Bramwell and *J. Thompson* (on the 2d of June) showed cause. First, this rule has been applied for too soon. This order of reference having been made not at *nisi prius*, and, therefore, there having been no verdict, the defendant is at liberty to come at any time during the term, after the making of the award, to set it aside; 2 Chit. Arch. 1503, 8th ed.; Russ. Arb. 623; and the plaintiff cannot till then enforce it. *Jones v. Ives*, 15 Jur. 107; s. c. 1 Eng. Rep. 382, is an authority in point, and the question asked by Maule, J., in *Hobdell v. Miller*, 2 Scott's N. R. 163, is pertinent here — "How can the plaintiff have costs taxed before it is certain that he can sustain the award?" Secondly, there has been no sufficient demand. It would have been insufficient if the award had not directed the defendant to pay to Serrell as well as to the plaintiff. But the arbitrator had no power to order the defendant to pay to any one else than the person to whom the money was due. He could not make Serrell the irrevocable attorney of the plaintiff, and it is only the relation of the attorney to his client that empowers the former to make the demand in any case; the arbitrator cannot confer that power upon an attorney by his award; and, therefore, if the demand by the attorney is good in this case, such demand would be good in every case. But rules to pay in this form are only made in the exceptional case, with respect to payment of costs. 2 Chit. Arch. 1518.

[*Maule, J.* The attorney has his lien on the sum recovered, and it may, therefore, be properly made payable to him.]

If the attorney seeks to enforce his lien, he can only do so in the name of his principal; an arbitrator cannot, to protect the lien, make his award in favor of the attorney. *Dunn v. West*, 15 Jur. 88; s. c. 1 Eng. Rep. 325. *Holcroft v. Manby*, 7 Man. & G. 843. Suppose Serrell had died, would his executor have been entitled to receive the money?

[*Cresswell, J.* The person entitled to receive it must be Mr. Serrell, and he must be the plaintiff's attorney.]

The award is bad, being in the alternative to pay to the plaintiff or to Serrell. Also, the demand is insufficient, as Serrell, without a warrant of attorney, could not give a valid discharge.

[*Jervis, C. J.* The form followed in this case is that given in Tidd's Forms, 306, 307, 8th ed.

Hare v. Fleay.

Maule, J. The form and practice are very convenient, and such as ought to be followed.]

Thirdly, the court has not power to make this order, under the 1 & 2 Vict. c. 110, s. 18. *Creswick v. Harrison*, 15 Jur. 108; s. c. 1 Eng. Rep. 384. The practice of making such orders first commenced in *Jones v. Williams*, 11 Ad. & El. 175.

[*Maule, J.* That was a very suspicious beginning; it arose out of a suggestion made by the court, which was, therefore, eminently extra-judicial. But there are a number of cases reported in which these orders have been made, and the practice of making them is now inveterate. *Doe v. Amey*, 8 M. & W. 565; *Neale v. Postlethwaite*, 1 Q. B. 243; *Tattersall v. Parkinson*, 2 Exch. 342; and *Jones v. Williams*, 8 M. & W. 349, were referred to.]

Lastly, if this order is made in the terms prayed, who is to issue execution?

[*Maule, J.* The plaintiff is to issue execution. The payment is to be to the attorney for the plaintiff.]

Lush, in support of the rule. The award to pay to the plaintiff or to his attorney is good, and according to established practice; and is convenient, as it saves the expense of a warrant of attorney. This application is not too soon. The plaintiff is at liberty to enforce the award before the defendant had lost his opportunity of moving to set it aside. If the award is bad, that is equally available to the defendant in showing cause against the plaintiff's rule to enforce it, as it is in support of his own application to set it aside. The cases cited as authorities are not cases in point. In *Jones v. Ives*, the cause and all matters in difference had been referred by order of *nisi prius*, and the motion was for the plaintiff, in whose favor the award was made, to sign judgment, and for the master to grant his *allocatur* for the costs. The present is not such a motion; it is for an order in the nature of an attachment; and it is no answer to an attachment for the defendant to say, "Possibly I may yet move to set the award aside." In other of the cases the question has been, whether the applicant was in time to set it aside. That is a totally different question from whether the successful party is too soon to enforce it.

[*Maule, J.* Where the arbitrator is in the position of a jury, there is a fixed time within which a motion in arrest of judgment may be made. Until that time has expired, judgment cannot be had. But where the award is subject to a motion to set it aside, as where the reference is under the 9 & 10 Will. 3, c. 15, such a motion is not in the nature of a motion in arrest of judgment, but in the nature of a writ of error. Now, the non-lapse of time within which a writ of error may be brought is no objection to an execution, although no doubt an actual writ of error is a *supersedeas*. This possibly may be the distinction upon which the cases turn.]

Doe v. Amey, 8 M. & W. 565, decides, that it is no objection to enforcing an award that the time has not elapsed for setting it aside. If it were an objection, then an award which ordered a thing to be done immediately would in many cases be nugatory.

Hare v. Fleay.

Corbett v. Nicholls, 2 Lownd. M. & P. 87, is an authority to the same effect.

JERVIS, C. J. This rule must be made absolute. The only point as to which the court have had any doubt is, whether this application was made too soon; that is, whether it could be made before the time for setting the award aside had elapsed. Independently of authority, there seems, in justice, to be no reason why, when one party has committed a breach of his duty, and, after request made, refused to pay according to the award, he should have further time given him for payment, simply because he has that further time in which he may move to set the award aside. If the award is bad, that will be good cause to show against the rule for enforcing it. *Jones v. Ives*, which has been cited against this view, as I understand it, proceeded on this ground. The reference was of the cause and all matters in difference, and the plaintiff, before the expiration of the term, after the award was made, came to the court asking to be allowed to sign judgment, and that the master should grant his *allocatur* for the costs. This the court refused, because the practice is, that, where the cause only is referred, judgment may be had at the expiration of the first four days of the term following the award, and the master can then tax the costs and issue his *allocatur*. But where the reference is of the cause and of all matters in difference, the master cannot tax the costs or issue his *allocatur* until the end of the term. There is no express authority deciding what the practice is with regard to such an application as the present. But in *Doe v. Amey*, the Court of Exchequer made absolute a rule for payment of a sum of money under an award before the period had elapsed for setting the award aside; and from that we may infer what the practice is. As to the other points, I think the demand by the attorney was sufficient, and that the award is drawn in a convenient form, directing payment to the plaintiff or to his attorney, as it saves the unnecessary surplusage of a warrant of attorney. The order of the court will be, upon the demand of the attorney, that the defendant pay the plaintiff. The effect of it will be a judgment in favor of the plaintiff, upon which he, and not the attorney, can sue out execution.

MAULE, J. I am of the same opinion. As to the point last adverted to by the lord chief justice, I think that the award follows the usual and a convenient form. It is wrong to say that the convenience or necessity of the party, in a case like this, requires a warrant of attorney; and the practice does not require it. As to the main point, whether the award can be enforced by means of this rule, we must take it to be established practice that such a rule may be made in cases where an attachment would be granted; but whether it may be made before the time has expired in which a motion may be made to set the award aside, is a question of some importance. It turns much on this—some motions made on awards are strictly in arrest of judgment, others are in the nature of motions in arrest of judgment, and others are in the nature of writs of error.

Hare v. Fleay.

Now, a motion in arrest of judgment must be made within the first four days of the next term, and until that time has expired the plaintiff has only an inchoate right to judgment; therefore, it may be properly held, that no proceedings, subject to a motion like that, shall be enforced before the expiration of the time within which the motion may be made. The very expression, "motion in arrest of judgment," implies that the judgment does not exist so long as that motion may be made. As to those motions, however, which are in the nature of writs of error, it cannot be said that, until the time has gone by within which the other party may bring his writ of error, the successful party has not his judgment in that court in which judgment has been given for him. That court never treats the reversal of its judgment as a probability; if it did, it might treat the reversal of the decision of the Court of Exchequer Chamber as probable; and so it might be said, that in no case was a person entitled to his judgment until the final decision of the House of Lords had been given in his favor. This explains the expression attributed to me in *Hobdell v. Miller* — "How can the plaintiff have costs taxed before it is certain that he can sustain the award?" That seems reasonable enough, applied to cases where the award is subject to a motion in the nature of a motion in arrest of judgment; but it is not applicable where the motion is in the nature of a writ of error, for in that case it is certain that the plaintiff has got the judgment of the court, and, so far as there can be any certainty, that he will also get his costs. If, under the 9 & 10 Will. 3, c. 15, s. 1, 2, a motion had been made to set aside this award on the ground of misconduct in the arbitrator, it must have been made within a certain time, that is, before the last day of the next term after the making the award. But that act assumes that there is a power of enforcing it before that time has elapsed, though a power exists of resisting its enforcement on the ground that it was improperly made, and of setting it aside. I think, therefore, the motion to set aside the award, in cases under the 9 & 10 Will. 3, c. 15, or in the analogous case where the parties by consent have referred a pending suit, not by order of *nisi prius*, being in the nature of a writ of error, that there may, before the time for making such motion has expired, properly be a motion made (which, before the stat. 1 & 2 Vict. c. 110, would have been for an attachment) for an order to perform that which the award made a rule of court orders to be performed, and, therefore, that this motion is not made too soon.

CRESSWELL and TALFOURD, JJ., concurred.

Rule absolute.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER;
AND UPON
WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER;
DURING THE YEAR 1851.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF EXCHEQUER.]

[*Coram* PATTESON, MAULE, WIGHTMAN, CRESSWELL, ERLE, and TALFOURD, JJ.]

ELLIS *v.* REGINA.¹

Trinity Vacation, June 21, 1851.

*Bond to the Crown — Power of Disposition — Exercise of Power —
Record.*

A bond to the crown under the 33 Hen. 8, c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond.

The giving such a bond is a voluntary act upon the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the crown.

Such bond is within the 33 Hen. 8, c. 39, though made payable to "the king, his heirs and successors," and, being a record, can be looked at by the court, although it be not set out in the pleadings.

THIS was a writ of error upon a judgment of the Court of Exchequer. The case in the court below is reported in 4 Exch. 652. It appeared that by writ of extent, tested the 12th of April, 1848, and directed to the sheriff of Devonshire, after reciting that John Mudge, by his bond, dated the 5th of December, 1835, became bound to King William IV. in 20,000*l.*, payable at a day certain, part of which sum had not been paid, the sheriff was commanded to inquire what lands, &c., the said Mudge had on the 5th of December, 1835, on which day he became a debtor to his said late majesty, or at any

¹ 20 Law J. Rep. (N. S.) Exch. 348. 15 Jur. 917.

Ellis v. Regina.

time since; and also what goods, &c., and of what sort or value; and also what debts, credits, specialties, and sums of money the said John Mudge, or any other person in trust for him, had in the said bailiwick; and to cause all and singular the said goods and chattels, lands and tenements, &c., in whose hands soever they were, to be carefully appraised, and extended and taken and seized into her majesty's hands, that they might be retained until her majesty should be fully satisfied her said debt, &c. The inquisition, dated the 9th of May, 1848, found that "John Mudge, on the 5th of December, 1835, and on the day of taking the inquisition, was seized in his demesne as of fee simple, under and by virtue of indentures of lease and release, dated respectively the 15th and 16th of November, 1827, of and in certain premises (describing them) then in the occupation of E. Grant, M. Arnold, and John Mudge." The inquisition further stated, "that by certain indentures of lease, appointment, and release, dated the 4th and 5th of February, 1841, and made between the said John Mudge of the first part, T. Ellis of the second part, and W. Rawlings of the third part, the said John Mudge did appoint, grant, and release the said hereditaments unto the use of the said T. Ellis, his heirs and assigns forever, upon trust for sale, for securing to him, the said T. Ellis, the sum of 500*l.* and interest; by which indentures it was declared that the said W. Rawlings, his executors, administrators, and assigns, should stand possessed of the residue of a certain term of one thousand years in the said premises created by indenture, dated the 15th of February, 1815, upon trust for the said T. Ellis, his heirs and assigns, for better securing the repayment of the said sum of 500*l.* and interest, and in the mean time to attend the inheritance." All of which said lands, tenements, &c., the said sheriff returned that he had, by virtue of the said writ, seized and taken into her majesty's hands. This inquisition having been filed, the defendant below thereupon laid claim to the said lands, and afterwards filed the following *monstraunce de droit* or plea: The plea in substance stated that, long before the said John Mudge had any thing in the said premises, one Robert Grant was seized in fee of and in the said premises, and, being so seized, conveyed them to John Mudge by indentures of lease and release, dated respectively the 15th and 16th of November, 1827. By the deed of release, (of which the defendant made profert,) it appeared that the conveyance was made to John Mudge, "to have and to hold the same to the said John Mudge, his heirs and assigns, to the use of such person or persons, for such estate or estates, and for such interest or interests, and upon and for such trusts, ends, intents, and purposes, as the said John Mudge at any time or times, by any deed or deeds, to be sealed and delivered by him in the presence of one, two, or more witness or witnesses, and to be attested by the same witness or witnesses, should direct, limit, or appoint, and in default of any such direction, limitation, or appointment, to the use of the said John Mudge and his assigns during his life; and from and after the determination of that estate, by any means, in his lifetime, to the use of the said Richard Rosdew Mudge, his heirs and assigns, during the life of the said John Mudge, upon trust for the said John Mudge and his

assigns; and from and after the determination of that estate, and in the mean time subject thereto, to the use of the said John Mudge, his heirs and assigns forever." The inquisition then set forth the mortgage by Mudge to Ellis for 500*l.* on the 5th of February, 1841, and contained the following averment: That the said appointment to the defendant by the said John Mudge was so made as aforesaid for and in consideration of the sum of 500*l.*, which was then actually paid by him to John Mudge; and that the defendant had not, at the time of the making the said appointment, any knowledge or notice, or any reason to believe or suspect, that the said John Mudge was then a debtor to our lady the queen; and that the said appointment was made *bona fide*, and for the purpose of securing the payment of the said sum of 500*l.*, and not for the purpose of defeating the queen of the payment of her debt, or for fraud, &c.; and also, that the said John Mudge hath not at any time repaid the said sum of 500*l.* to the defendant, but that the same, with a large sum for interest, is still due to the defendant. Verification, and prayer for judgment, that the hands of the queen may be removed, &c. To this plea there was a demurrer, for that it sufficiently appeared upon the pleadings that the appointment of the defendant was made subsequently to the execution of the bond by Mudge, and that, although alleged to be made pursuant to powers contained in the indenture of the 15th of November, 1827, the said appointment was invalid as against the crown. Joinder in demurrer. The demurrer came on for argument in the court below on the 7th of December, 1849, when judgment was given for the crown. Upon this judgment the present writ of error was brought.

Greenwood, for the plaintiff in error. The question is, whether the execution of a power prevents the operation of an extent. Ellis advanced the money to Mudge without knowing that he was a debtor to the queen, and the appointment under the power was made *bona fide*. He submitted to the court, that the reasons given for the judgment in the Court of Exchequer were artificial, and that fictions of law were resorted to in order to defeat a just claim. The court below, in effect, said, that if a man execute a bond to the crown, though he then owes it nothing, it binds all his lands, even in the hands of a *bona fide* purchaser, because he granted an interest to the crown by giving the bond; and a man cannot derogate from his own grant. It was established that a judgment, whether in an adverse suit or not, might be defeated by the exercise of a power of appointment. *Doe v. Jones*, 10 B. & Cr. 459. Lord Tenterden there said, "It has been established ever since the time of Lord Coke, that, where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are where the person executing the power has granted a lease, or any other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act." If that be a correct enumeration of the exceptions, the question is, whether Mudge, by executing the bond, granted an interest to the crown. The cases

 Ellis v. Regina.

referred to by his lordship do not apply to general charges or liens, but to the specific grant of an interest in land. So, if the judgment were upon a warrant of attorney. *Eaton v. Sanxter*, 6 Sim. 517. There the purchaser of the judgments, although he had notice, was protected. The argument of Sir E. Sugden shows that the judgment was founded on a warrant of attorney, so that, in fact, it was a voluntary charge; and although the Court of Exchequer expressed an opinion in this case, that all judgments must be taken to be hostile proceedings *in invilum*, yet it is well known that the giving a warrant of attorney is one mode of creating a charge, and one of the most voluntary acts we can commit. In the subsequent case of *Skeeles v. Shearly*, 3 My. & C. 112, Lord Cottenham followed those decisions. The court below, however, were of opinion that the execution of the bond was equivalent to a grant of an interest to the crown, which the party could not defeat; but that was giving a purely fictitious effect to the bond. It was in the ordinary form, and of the same effect as a warrant of attorney. Gilbert, C. B., in his Treatise on the Court of Exchequer, p. 96, says, "Towards the time of Henry VII. and Henry VIII, as the revenue increased, and merchants were obliged to make payments, the customers and collectors received bonds from the parties to the king. These collectors were no more than bailiffs or receivers. . . . The obligation is no more than a warrant of attorney for the ministerial or other person to deliver it of record." Therefore, before the stat. 33 Hen. 8, c. 39, these bonds were only warrants of attorney to the king's bailiffs, enabling them to make them debts of record, and so to be equal to judgment. After that statute they were made equal to statute staple, and on that statute the case depends. Gilb. Exch. 102. In Com. Dig., "Execution," B. 3, it is said, "By stat. 33 Hen. 8, c. 39, all obligations and specialties for any cause concerning the king shall be taken *domino regi*, and shall be of the same force and effect as a statute staple, and all process judgments and executions on the same shall be of the same effect against all bound, their heirs, successors, executors, and administrators, and no other, as on a statute staple."

[*Patteson, J.* The words "and no other" are not in the statute. The chief baron has put in those words.]

It shows what was his opinion. A statute staple is only an acknowledgment of a debt before the mayor of the staple, or the chief justice of the Queen's Bench or the Common Pleas, and so is equivalent to a judgment; and that is overreached by a power of appointment. The court below had made the bond actually superior to a statute staple or judgment, instead of the same effect. It was clear, that if a subject had judgment of statute staple, and there was also a crown debt, the land would be bound by both; but if he issued execution, the extent would be defeated. Gilb. Exch. 91, 92. That showed that there was no such general rule as had been laid down, that land once extendible was always extendible, but that it depended on the first possession. Mr. West, in his book on Extents, p. 160, cites a long case from Hardress, and states as the result, "Where the subject has a lien on the land by judgment prior to the

Ellis v. Regina.

king's debt of record, or the entry into office, &c., or to the commencement of the crown suit, and has perfected his execution before the issue of the extent at the suit of the crown, in this case it seems clear that the subject shall retain the land against the crown's extent." Therefore, the judgment of the court below would lead to a contradiction, as they said that the power of appointment would not overreach the bond to the crown, but it would a statute staple or judgment, to which it is equivalent. Suppose that a power of appointment was created, and then there was a bond given to the crown, and a judgment obtained by a subject, and the power was exercised in favor of a third person; who would have the land? Not the crown, because the cases decide that the judgment creditor would have priority; not the judgment creditor, because his judgment would be overridden by the power; but neither, according to the Court of Exchequer, would the appointee be entitled to the land. This arose from giving to the bond the effect of a grant of land, instead of a statute staple or judgment. The other side relied almost entirely upon one decision, which was called *Sir Edward Coke's Case*; Godb. 289; 2 Roll. Ab. 294, and cited by Lord Coke in 10 Rep. 55, *b*; but there the lands remained in the possession of the crown debtor, who had the entire disposing power.

[*Patteson, J.* If he had granted a rent charge, he could not have defeated it; so that, after all, the question is, whether the charge be a voluntary or an involuntary one. Here the bond was executed by the party's own free act.]

In *Coke's Case*, the court said that Sir C. Hatton always had "a tie on the land." That case might have applied if Mudge had never exercised the power. There were many instances where the liability of land to an extent might be defeated by the act of the party. *Nicholl's Case*, 2 Vern. 289.

[*Cresswell, J.* The Court of Exchequer distinguished that case, upon the ground that it was a chattel.]

It still showed that there was no such universal proposition as was contended for, that land once extendible was always so. Now, unless the crown debt were registered, the judgment creditor would be protected by the stat. 2 & 3 Vict. c. 11, s. 8. Trust estates fairly parted with to a *bona fide* purchaser are not extendible, though they may have been liable to an extent before so parted with. *Rex v. Smith*, Sugd. V. & P., App. No. 15, is relied on; but Sir E. Sugden, in his *Vendors and Purchasers*, (pp. 778, 779, ed. 1846,) finds fault with that case.

[*Patteson, J.* There is another case of the name of *Rex v. Smith*, in *Wightwick*, but that is upon a simple contract. In the Exchequer, it is said to be the same case as the one referred to by Sugden; that is a mistake.]

So, *West on Extents*, (p. 138,) after setting out the stat. 7 Hen. 8, c. 75, refers shortly to *Anderson's Case*, 7 Rep. 21.

[*Maule, J.* There it was held to be only a special liability as long as it was held under the entail. Before the statute of Hen. 8, land was liable in the hands of the tenant in tail only, and not of his

Ellis v. Regina.

issue. I suppose the proposition, *e contra*, is, that, if land is once generally liable, it remains so. Do you find a case of land simply and generally liable to extent defeated by the alienation of a party in possession? In *Coke's Case*, the estate was vested in the son.]

Dower is overreached by a power of appointment. A man, by marriage, creates a vested estate, but it is subject to be divested by an exercise of the power of appointment created by an earlier instrument. In *Maundrell v. Maundrell*, 10 Ves. 246, the whole principle is fully discussed. The person who exercises the power is but the mouthpiece of him who created it, and, therefore, it overrides subsequent charges, and should do so in this case. See also *Golding Ray the younger v. Pung*, 5 B. & Al. 561; 5 Mad. 510. It is the same as if the power were exercised by the deed which creates it. *Noel v. Lord Henley*, M'Cl. & Y. 302. In *Witham v. Bland*, 3 Swanst. 277, note, a sequestration was defeated by the exercise of a power.

[*Maule, J.* In the case of an extent, the prerogative of the crown is always an ingredient.]

The question, in truth, is, whether the bond was equivalent to a grant to the crown, so as to make the exercise of the power a dishonest attempt to defeat the right. *Roach v. Wadham*, 6 East, 289. The cases as to derogation from grants are cases of grants of specific interests out of land, which the party had no right dishonestly to defeat by a subsequent exercise of the power. See the judgment of Lord Tenterden, in *Doe v. Jones*, 10 B. & Cr. 468; and so are the cases referred to by him; for example, *Gilb. on Uses*, 142, or 314, new paging. But it is different where a general charge or lien is created by operation of law. *Edward v. Sleater*, Hardr. 410, 415.

[*Patteson, J.* Can you deny that the bond created a charge on the land? *Saunders on Uses*, 142, lays down, "In the case of the crown, it is the debt itself which makes a charge on the land." If so, it resolves itself into a question whether it is *in invitum*.]

It is a charge on land, but only in the same sense as a statute staple.

[*Patteson, J.* If a man were to grant a rent charge, no estate would be granted.]

But that would be a limited and distinct grant, which passes an interest.

[*Maule, J.* No one has an interest in land by virtue of a judgment. At common law, before any statute, was a judgment binding on lands?]

Not before the Statute of Westminster, and that enables judgment creditors to take land if they please. Judgments may be the necessary legal consequence of a purely voluntary act.

[*Maule, J.* In Co. Litt. 207, b., it is said, "Statute staple having effect of debt of record." Gilbert means no better position than a statute staple; you have to show no worse position.]

At first, statutes staple were intended to be only between merchant and merchant. Bac. Ab., "Execution," D. [*Sand's Case*, Hardr. 495, was also cited.]

Ellis v. Regina.

Crompton, for the defendant in error.

[*Patteson*, J. Do you maintain that, if this was between subjects, the exercise of the power would not override the bond?]

Yes; and *a fortiori* when the bond is given to the crown. If a man has a disposing power, it goes to the crown by virtue of the bond, and is seizable under an extent. West says, "The crown may take trust estate." Sir E. Sugden, in p. 223 of his work on Powers, says, "Where the king's debtor has a power of disposing for his own benefit, whatever are the ceremonies required to its execution, and although he die without executing the power, the land may be extended for the debt by virtue of the king's prerogative. The judges have at all times been studious to advance the remedy for the recovery of the king's debts, for (as Doddridge observed) it is for the increase of his treasury; and the treasury is the king's strength, and the king's strength is *vinculum pacis* and *nervus belli* — the overflowing fountain of his beneficence and benevolence." The lands are subject to the crown by force of the word "*habuit*," for *habuit* the lands in his power. (*Coke's Case*.) It must be a power that a party can exercise for his own benefit. The authorities are all cited in *Sir E. Coke's Case*. A judgment is the act of the court *in invitum*. That distinction is pointed out in *Doe d. Wigan v. Jones*, 10 B. & Cr. 459. The effect of a bond and a statute staple is the same; that is, the land is charged, but the mode of charging it is not the same. In the one case it is the act of the court, which is generally *in invitum*; but the bond must be voluntary, and constitutes a debt of record, which binds the land from the time of its execution.

PATTESON, J. This is a bond entered into by Mr. Mudge to the crown, and it is within the stat. 33 Hen. 8, c. 39. The point as to executors was not raised; that was decided in the House of Lords long ago. That statute enacts, "That all obligations and specialties which, after the 1st of May next coming, shall be made for any cause or causes touching, or in any wise concerning, the king's most royal majesty or his heirs, or to his, or their use, commodity, or behalf, shall be made to his highness by these words, '*domino regi*,' and to none other person or persons to his use; and to be paid to his highness by these words, '*solvendi eidem domino regi, hæred, vel executoribus suis*,' with all other words used and accustomed in common obligations; and that all such obligations and specialties so to be made shall be good and effectual in law to all purposes and intents, and shall be of the same nature, kind, quality, force, and effect, to all intents and purposes, as the writings obligatory taken and acknowledged according to the statute of the staple:" that means the statute staple itself. Now, what was the effect of a statute staple? It bound all the lands the party then had, that is clear; because the stat. 27 Eliz. c. 4, s. 8, expressly provides, that unless the statute staple is registered, as required by the 7th section, it shall be void as against a purchaser for a good consideration; so that, before the passing of that statute, it would have bound land so purchased. But it is said that it is only a judgment; and as a judgment, suffered

Pears v. Wilson.

even voluntarily, may be overridden by the exercise of a power of appointment, so may a statute staple, and a bond given to the crown. If this were so, it would be necessary to see if the position of the crown, under such circumstances, varies from that of the subject. But the effect in the two cases is not the same, because the land is bound by the mere act of the party entering into the bond, which is his voluntary act; he thereby admits, "I am your debtor of record, and you may take my lands in discharge of your claim." A judgment is very different; that is only an authority which may be exercised or not, and until it is entered up by a creditor (not by the debtor) no charge is created. Therefore, all judgments are said to be *in invitum*. On that point the Court of Queen's Bench decided *Doe v. Jones*, and several cases in Chancery have been decided upon it. This is not a proceeding *in invitum*. Then it is clear law, that, where a man has an estate and a power of appointment, he cannot exercise it so as to avoid his own act affecting the estate. This is not denied in cases of mortgages or rent charges; and the case results in the question, whether the giving of this bond belongs to the class of charges such as I have just mentioned, or is more in the nature of judgments which are always *in invitum*; and we think that the Court of Exchequer was right in holding that it came within the former class. The only other question is as to the term of years mentioned in the inquisition. Where a man has substantially the estate, there, *per cursum scaccarii*, the crown has the right of taking it under an extent, as was said in the court below. We, therefore, think that the decision of the court below was right, and right on the grounds on which it was there put. The distinction is somewhat technical, and perhaps not altogether just; but it does exist, and the judgment of the court below will, therefore, be affirmed.

Judgment affirmed.

PEARS v. WILSON.¹

Trinity Term, July 10, 1851.

County Court — Jurisdiction — Legacy — Record — Prohibition.

The 13 & 14 Vict. c. 61, s. 14, 16, does not take away the writ of prohibition in cases where the county court is acting without jurisdiction.

Quære, whether prohibition lies to a county court after sentence where no defect appears on the face of the proceedings.

When an objection is taken to the jurisdiction of the judge of a county court, he ought to enter it on the proceedings, in order that a superior court may see if there is ground for a prohibition.

A residuary bequest is a legacy within the 9 & 10 Vict. c. 95, s. 65.

A bequest of money may be a legacy within the meaning of that section, although payable through the intervention of a trustee.

¹ 20 Law J. Rep. (n. s.) Exch. 381. 15 Jur. 932.

Pears v. Wilson.

UDALL, in Easter term, on the 6th of May, moved for a prohibition to the judge of the County Court of Durham, at South Shields, to prevent him further proceeding in a plaint entitled "Between John Pears, administrator of Mary Pears, and James Wilson, executor of Christopher Thew."

The testator, by will, dated the 8th of June, 1841, devised and bequeathed to Christopher Mould and James Wilson, their executors, administrators, and assigns, respectively, all his household furniture, books, plate, linen, and china, and his leasehold messuage and dwelling-house, *upon trust* to renew the lease, pay all taxes and charges, and permit and suffer one Margaret Purvis to occupy and enjoy the dwelling-house, and to have the use of the household furniture, &c., during life; and after her decease, then *upon trust* to sell and dispose of the same, and invest the money arising therefrom as thereafter mentioned. He then devised and bequeathed to the same Christopher Mould and James Wilson, their heirs, executors, administrators, and assigns, all his money, securities for money, ships, parts or shares of ships, houses, and all other his estate and effects whatsoever and wheresoever not thereinbefore disposed of, *in trust*, to sell and dispose of the same, and *upon further trust* to pay, apply, and dispose of the money arising therefrom in manner and for the purposes thereafter expressed or declared. The testator then declared and directed that Christopher Mould and James Wilson, their heirs, &c., should stand and be possessed of, and interested in, the money to arise from the sale of the ships, &c., devised, and also from the sale of the household furniture, &c., after the death of Margaret Purvis, and proceeded thus: "Upon the trusts following, that is to say, in trust to place out at interest the sum of 800*l*. in the names of them my said trustees or the survivor of them, or the executors or administrators of such survivor, in the public funds, or on other good and sufficient securities, and pay the dividends or interest thereof, when and as the same shall become due, unto the said Margaret Purvis so long as she shall live. And from and immediately after the death of the said Margaret Purvis, then, *upon this further trust*, to pay the said dividends or interest as the same shall become due and be received unto Henry Mould, son of the said Christopher Mould, for and towards his maintenance and education until he shall arrive at the age of twenty-one years, and then upon trust to call in and pay the said principal sum of 800*l*. unto the said Henry Mould, his executors, administrators, or assigns, and upon trust as to the remainder of the money to arise and be produced from the sale of all my said estate and effects hereinbefore devised as aforesaid; and also all my money on securities, *in trust* to divide the same in the shares and proportions following, that is to say, upon trust to place out or invest one equal sixth part or share on such security as my said trustees shall approve, and pay, and apply the interest or dividends arising therefrom, as the same shall come in and be received, unto my brother Thomas Thew during his life, and from and immediately after his decease, upon trust out of the said interest or dividends of the said sixth part or share to pay unto William Thew, son of my

Pears v. Wilson.

said brother Thomas Thew, 1*l.* per week during his life, and to pay the remainder of the interest or dividends of the said sixth part or share equally between Thomas Thew Grant and Robert Grant, grandsons of my said brother Thomas Thew, for and towards their maintenance and education, and from and immediately after the death of the said William Thew, to pay the whole interest or dividends of the said sixth part or share equally between the said Thomas Thew Grant and Robert Grant until they shall attain the age of twenty-one years, and then, on the youngest of them attaining such age, to transfer and assign the said sixth part or share to the said Thomas Thew Grant and Robert Grant, their executors, administrators, and assigns, equally between them, share and share alike; but if the said William Thew shall be then living, then such transfer to be postponed until his decease; and *upon trust* as to one other sixth part or share to pay and transfer the same unto and equally between and amongst the children of my sister Mary Purdy at the age of twenty-one years, or the issue of any who shall have died leaving issue, such issue to take only their parent's share." [The testator having given the other four sixths on various trusts among his brothers and sisters and their children, continued:] "And I declare and direct that my said brothers and sisters and their respective issue shall not receive or be entitled to any part or share of the money hereinbefore directed to be invested or paid as aforesaid, or the interest or dividends thereof, until he, she, or they shall have accounted for, or brought into hotchpot, so much money as I shall have lent or advanced to him or them in my lifetime, according to the accounts kept by me and found in my possession at my decease." The testator then nominated Christopher Mould and James Wilson executors and trustees of his will, with a direction in these words: "My executors and trustees hereby appointed, their respective heirs, executors, and administrators, shall not be answerable or accountable the one for the other of them, and they or any of them shall not be charged or chargeable with, or answerable for, the acts, receipts, neglects, or defaults of the other of them, nor for any loss which shall happen by the act or failure of any person or persons whomsoever employed, or acting in the said trusts under the said trustees for the time being, and also they respectively shall and may retain out of the said trust estates and premises all their costs and expenses to be occasioned by the execution of the trusts, &c., in them reposed in pursuance of this my will." To this will there was a codicil, bearing date the 26th of July, 1842, in which the testator, after reciting that, since the making of his will, Christopher Mould, one of the executors therein named, had departed this life, used these words: "Now I do hereby appoint Samuel Elstob, of, &c., to be an executor of my said will, in the room and stead of the said Christopher Mould, deceased, and to act in conjunction with the other executor in my said will so named." The testator having died, and the will been proved by both executors, the proceedings in the county court were commenced by summons on the 18th of February, 1851. The plaint purported to be in contract, and the plaintiff's demand was alleged to be for 34*l.* 13*s.*, being one fourth of one sixth part or

Pears v. Wilson.

share of the residue of the property of the testator, to which the wife of the plaintiff was entitled under the above will, together with interest, making in the whole 43*l.* 7*s.* 3*d.*, and also on an account stated. It also appeared that a suit in chancery had been instituted against the executors by Christopher Purdy and others interested, and that in June, 1851, the usual order was made for a reference to the master to take an account of the residuary legatees, &c., under this will, which reference, the affidavits alleged, was still pending, and the amount of the residue still unascertained. The defendant appeared at the county court and objected to its jurisdiction in the matter; but the judge, on the 21st of April, overruled the objection, and gave judgment for the sum demanded, together with 6*l.* 8*s.* 10*d.* for costs. The present motion was made on two grounds: First, that the county court, as constituted by the 9 & 10 Vict. c. 95, and the 13 & 14 Vict. c. 61, has no jurisdiction in case of a *residuary* bequest; for although the language of the 65th section of the former act is, that "the jurisdiction of the county court under this act shall extend to the recovery of any demand not exceeding 20*l.*, which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of *any legacy* under a will," it was not intended to empower the county court to decide on complicated demands in respect of an unascertained residuary sum. Secondly, that this was not the case of a legacy, but a devise in trust—that the trustees were the *legal* owners of the property devised, and, consequently, the plaintiff's claim, if valid, could only be enforced against the estate.

The court seemed disposed to think the first objection untenable, but on the second granted a rule to show cause.

This rule was argued at the present sittings, on the 21st of June, when

Unthank showed cause. Supposing the construction put on this will by the opposite side to be the true one, there are still several objections to this rule. First, judgment has been given in the court below, and it is a principle that prohibition will not lie after sentence in an inferior or ecclesiastical court, unless the defect of jurisdiction appears on the face of the proceedings. Com. Dig., "Prohibition," D. *Argyle v. Hunt*, 1 Str. 187. *Buggin v. Bennett*, 4 Burr. 2035. *Blacquire v. Hawkins*, 1 Dougl. 378. *Full v. Hutchins*, 2 Cowp. 422. *In re Poe*, 5 B. & Ad. 681. *Roberts v. Humby*, 3 M. & W. 120. *Ricketts v. Bodenham*, 4 Ad. & El. 433. *Lord Beauchamp v. Turner*, 10 Ad. & El. 218. *Thompson v. Ingham*, 19 Law J. Rep. (N. S.) Q. B. 189. [*Parke*, B. Can you apply that principle to a summary procedure like that in the county court, where no regular record is made of the proceedings?]

County courts, under the recent statutes, are expressly created courts of record by the 9 & 10 Vict. c. 95, s. 3; by sect. 59, the proceedings are to be commenced by plaint, which is to set out the substance of the plaintiff's action; a summons is then to issue, which is to restate the matter in the plaint; and, by sect. 111, the clerk of

Pears v. Wilson.

the court is to "cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered, from time to time, in a book belonging to the court, which shall be kept at the office of the court, and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceedings referred to by such entry or entries, and of the regularity of such proceeding, without any further proof." That book, we contend, is, in law, the record of the county court. Secondly, the sum demanded exceeding 20s., the plaintiff's remedy against the decision of the judge of the county court in this case was by appeal under the 13 & 14 Vict. c. 61, s. 14, 16. Thirdly, although the plaintiff might not be able to recover this money as a legacy, still, if the executor admitted assets and promised to pay, he would be liable under the account stated.

[Alderson, B. The affidavits show that the residuary estate has not been ascertained.]

But this is the case of a legacy. A legacy is defined to be a gift left by the deceased to be paid or performed by the executor or administrator. Swinburne's Wills, 46. Tomlin's Law Dict., tit. "Legacy." 2 Wms. Exors. 905. As to its being a trust, every legacy is a trust in one sense, for it must be paid by the executor or administrator; but the test, whether a legacy is a trust in such a sense as not to be recoverable in a court of law, is to consider whether it would lapse by the death of the executor, or by that of the *cestui que trust*.

Udall, in support of the rule, having been directed by the court to confine himself to the last point, contended that it was an erroneous view of the will to suppose that the two defendants were both executors and trustees. Wilson and Mould were originally appointed in both capacities, either of whom might have elected to serve in one and not the other; while the codicil only appointed Elstob *executor* in place of Mould. If this view were correct, it was no part of Elstob's duty to pay legacies, the rights and functions of trustee and executor being quite distinct. On the point of prohibition after sentence, he referred to the language of Lord Ellenborough, in *Gould v. Gapper*, 5 East, 345.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. The short question in this case is, whether the money held in trust for the plaintiff is a legacy within the meaning of the stat. 9 & 10 Vict. c. 95. We have spoken to Lord Cranworth on the subject, who agrees with us that it is such a legacy. Every legacy is a trust to pay in a certain sense, and there is no rule as to the non-intervention of a trustee in such cases; consequently, a direction to hold in trust for a person who is neither infant nor *feme covert* is nothing more than a legacy.

Lowe v. Carpenter.

As we are of opinion that this is a legacy within the statute, it will not be necessary for us to consider the other point made, namely, whether a prohibition could issue in this case, no defect appearing on the face of the proceedings. We may however say, that, as the superior courts have the power to issue one when necessary, the judges of the county courts ought, whenever an objection is taken to their jurisdiction, to set out that fact on the minutes of their proceedings, so that the superior court may see whether there is ground for a prohibition or not. Those courts are courts of record, and, consequently, ought to make such a record as will make it appear that they had jurisdiction to act, otherwise there would be no redress in every case where the defect of jurisdiction does not appear on the summons.

Rule discharged, without costs.

LOWE v. CARPENTER.¹

Trinity Term, June 30, 1851.

2 & 3 Will. 4, c. 71 — Right of Way — Pleading.

In an action of trespass to land the defendant pleaded two pleas, founded on the 2 & 3 Will. 4, c. 71, alleging enjoyment as of right of a way over the land in question for twenty and forty years respectively. In support of these pleas, general evidence was given of user of the right of way, commencing about forty-eight years before the commencement of the suit, and continuing until within about two years of that time, and that there had been no interruption by others:—

Held, that the plea was not proved, and that there was no evidence to go to the jury in support of it.

Quære, whether such a plea is good which alleges the user of right to have been for twenty or forty years, as the case may be, preceding the commencement of the suit, without saying "next" preceding.

TRESPASS. The declaration alleged that the defendant, on the 1st of January, 1848, and on divers other days and times between that day and the commencement of the suit, with force and arms, &c., broke and entered divers, to wit, four closes of the plaintiff, situate in the parish of Eardisland, in the county of Hereford, (describing them,) being respectively part of a certain farm called "The Sytches," situate in the parish aforesaid, &c., and with feet in walking and with the feet of divers horses, mares, and geldings, and also with the wheels of divers carts, wagons, or carriages, crushed, damaged, and spoiled the grass and corn of the plaintiff, &c., there then growing and being, and with the feet of the said horses, &c., and with the wheels of the said carts, &c., tore up, subverted, damaged, and spoiled the earth and soil of the said closes, and other wrongs, &c.

Pleas—First, "the defendant says, that, for the full period of twenty years preceding the commencement of this suit, the occupiers of a farm called 'Riddimore,' in the said parish, &c., used and enjoyed

¹ 20 Law J. Rep. (N. S.) Exch. 374. 15 Jur. 883.

Lowe v. Carpenter.

as of right, and without interruption in respect of such occupation, a way over the several closes in which the alleged trespasses were committed, for themselves, their servants and horses, with wagons and other carriages, to pass to and from the said farm called 'Riddimore,' into a certain highway in the said parish at all times; that within the said period of twenty years, and when the alleged trespasses were committed, the defendant was the occupier of the said farm, and used the said way to pass to and from the said farm to the said highway, as in the declaration alleged, as he lawfully might for the cause aforesaid, and in so doing the defendant committed the said trespasses, doing no unnecessary damage to the plaintiff, and these are the alleged trespasses whereof the plaintiff hath complained;" concluding with a verification. The second plea was the same as the first, except that it alleged a user for forty years instead of twenty. The replication traversed the user and rights set up in the pleas.

At the trial, before Patteson, J., it appeared that the trespass complained of consisted in the user of a road which the defendant claimed a right to use in respect of a farm. There was general evidence of user of this road for a period of about forty-eight years, down to the year 1847, without interruption from any other person, but it did not appear to have been used between that time and the commencement of the present action, on the 14th of November, 1849. It being objected that this evidence did not satisfy the requisitions of the Prescription Act, 2 & 3 Will. 4, c. 71, the judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict, with nominal damages.

Greaves, in Easter term, obtained a rule accordingly, and also for judgment *non obstante veredicto*, on the ground that the plea was bad as varying from the ordinary form, in not stating the enjoyment to have been for twenty years "next" before the commencement of the suit.

Whateley showed cause. This case depends on the meaning of several sections of the 2 & 3 Will. 4, c. 71, intituled "An Act for shortening the Time of Prescription in certain Cases." By sect. 2, "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have

Lowe v. Carpenter.

been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." The 1st section having provided a time of limitation for claims of common and profits *a prendre*, and the 3d for claims to light and air, the 4th enacts, that "each of the respective periods of years herein before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." We contend, that, when there has been a general user for a period exceeding the twenty or forty years exacted by the statute, the right is not lost by want of proof of its continuance for a year or two previous to the commencement of the suit.

[*Platt, B.* What then do you do with the 6th section, by which it is enacted, that "in the several cases mentioned in and provided for by this act no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim"? According to your argument, an enjoyment for eighteen years would support a user for twenty.]

No; the meaning of the statute is this: If you prove an enjoyment for less than the twenty or forty years, as the case may be, no presumption can be made; but if you prove acts of enjoyment extending over a period longer than twenty or forty years, &c., with a subsequent interruption, it is a question for the jury whether the right did not exist during the required time. Indeed, an opposite construction would lead to absurdity, for enjoyment during every moment of the prescribed time is impossible, and enjoyment must be coextensive with the wants of the party entitled to the right. *Flight v. Thomas*, 11 Ad. & El. 688, clearly shows that it is not necessary to prove an actual enjoyment during the whole time: it was there held, that the clause in the 4th section of this statute, that an interruption to be effectual must be acquiesced in for a year, is not limited to an interruption in the middle of the term of twenty or forty years, but is equally applicable to an interruption ending with the last of the series of years. In *Hall v. Swift*, 4 Bing. N. C. 381, Tindal, C. J., says, "The second objection is, that though the stream was proved to have flowed to the plaintiff's premises more than twenty years ago, yet as there was some interruption before the twenty years began to run, and the stream did not flow again in its former course till within nineteen years, there is a want of sufficient evidence to support the plaintiff's claim. But it would be very dangerous to hold that a

Lowe v. Carpenter.

party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment."

[*Alderson*, B. This shows the danger of putting in words — a thing which persons who prepare codes never understand. Those who drew this statute said they would get rid of fictions in cases like the present, and meant to do so; instead of which, they establish that nineteen years means twenty years.]

The case of *Parker v. Mitchell*, 11 Ad. & El. 788, will probably be relied on, and is certainly in point against the defendant; but its authority has been very much shaken by the more recent case of *Carr v. Foster*, 3 Q. B. 581, which seems in point to the present; and the language of *Patteson, J.*, there is the more remarkable, as he was one of the judges who decided the former case. In the latter case it was held, that where proof is given of a right enjoyed at the time of the action brought, and for thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased, or was still substantially enjoyed; and that the inference to be drawn from the facts proved on this point is not a presumption within the meaning of the 6th section. As to the claim for judgment *non obstante veredicto*, the case of *Jones v. Price*, 3 Bing. N. C. 52, is an express authority that a plea under this statute is good without the word "next" before "the commencement of the suit."

Greaves, in support of the rule. The court is bound to look to the time covered by pleas like the present. Any antecedent time is irrelevant except in cases where it is doubtful whether the usage during a portion of the alleged time was a usage of right, in which case antecedent usage may be employed to explain it. But when, as here, a plea sets up an actual user and enjoyment for twenty or forty years before action brought, it is not supported by proof of a user coming down only to two years before that time. Proof of user is not indeed required for every day of the twenty years, or down to the very moment of bringing the action, but a substantial enjoyment must be shown from the *terminus a quo* to the *terminus ad quem*. It is absurd to call on a jury to presume that a man has enjoyed something during two years, when the evidence shows he has not enjoyed it, and from thence to make a second presumption that that enjoyment was a rightful one. Another reason why nothing short of actual user can satisfy the statute is, that the effect of user during the prescribed time is to give a party a right over another man's property, which, under the old law, might have been defeated by showing the origin of the usage or unity of possession. It should also be remembered that acts of user are things known to the party doing them, but of which the person against whom the right is claimed may be ignorant. One of the earliest cases on this statute was *Wright v. Williams*, Tyr. & G. 375, where the court, in delivering judgment, say, "We are of opinion that it is impossible to construe the act of Parliament (2 & 3 Will. 4,

The Attorney General v. Metcalfe & another.

rightly decided, and the judgment in *Ward v. Robins* gives the true view of this matter.

Rule absolute to enter a verdict for the plaintiff, with nominal damages, unless the defendant within a fortnight gives notice to the plaintiff that he wishes to have a new trial on payment of costs, and then the defendant to be at liberty to add pleas of a right by prescription and non-existing grant. The costs to be paid on adding the pleas, and the defendant to take such notice of trial as the plaintiff can give.

THE ATTORNEY GENERAL v. METCALFE & another.¹

Hilary Term, January 24, 1851.

Legacy Duty — Discretion of Trustees to sell — Payment and Satisfaction of Legacy.

A. B., and C. his eldest son and heir apparent, by indenture dated the 9th of January, 1800, joined in conveying certain lands and hereditaments of A. B. to trustees, for a term of one hundred years, subject to certain trusts during the joint lives of A. B. and C., and with power of revocation, and with divers remainders over. By indenture of the 18th of May, 1814, reciting, *inter alia*, that A. B. was not possessed of sufficient personal estate to pay the debts he might owe and the legacies he might bequeath at his death, without the sale of his family pictures, &c., A. B. and C., after revoking the trusts of the deed of the 9th of January, 1800, appointed that the said lands, &c., should be held by certain trustees, in trust, to sell within six months after the death of A. B. so much as would raise a sum necessary for the payment of his debts and legacies, not exceeding 50,000*l.*, the same to be paid to his executors and applied in aid of his personal estate, (only certain portions of which personal estate were, by deed poll of the 18th of May, 1814, directed to be used prior to such 50,000*l.* being raised,) with a further trust to convey what should not be sold to C. for life, with certain remainders and limitations, and in default of such taking effect, with remainder, as to one undivided third to Lady S. and S., a daughter of A. B., for life with remainders to her sons, in tail; and as to the two other undivided thirds to D. and E., two other daughters of A. B., severally, with divers remainders over. By will, dated the 25th of June, 1814, and several subsequent codicils, A. B. appointed M. and others executors, and bequeathed to them two sums of 10,000*l.*, in trust, for such purposes as, notwithstanding her coverture, Lady S. and S. should appoint, and, in default of appointment, to her separate use. C. died in the lifetime of A. B., without issue, and A. B. himself died the 25th of December, 1824, without altering his said will and codicils, and leaving Lady S. and S., D. and E., respectively married and surviving. The personal estate of A. B. was insufficient for the payment of his debts and legacies without part of the 50,000*l.* being raised. By virtue of common recoveries, the respective estates tail of the sons of Lady S. and S., C. D. and E. were barred; and by deed, dated the 11th of July, 1826, between all necessary parties, it was agreed that a partition of the estates mentioned in the deed of the 18th of May, 1814, should take place.

The partition was accordingly effected by deed of the 21st of July, 1826, and by indenture of the 20th of September, 1826, one undivided third part was settled to such uses as Lady S. and S., her husband, and her eldest son, J. F., &c., or the survivor of them, should appoint. By deed of January, 1827, between Lady S. and S., D. and E., and their respective husbands and other necessary parties, after reciting that a partition had taken place, and certain lands, &c., were allotted to Lady S. and S.; that the debts and legacies had been paid, except the two sums of 10,000*l.*, which were raisable by sale of so much of the estate as might be required, but that the parties had agreed that, instead of a sale taking place, each undivided third part should be charged with one third of such legacies; that certain sums had been paid to the executors of A. B., in part satisfaction of two of the respective

¹ 20 Law J. Rep. (N. S.) Exch. 329.

The Attorney General v. Metcalfe & another.

third parts, it was witnessed that certain lands, specified in a schedule annexed to the deed marked A, were conveyed to the use of the executors of the will of A. B., for a term of one thousand years, and subject thereto to the uses declared by the indenture of the 20th of September, 1826, upon trust, to raise, by mortgage or sale, the sum of 14,166*l.* 13*s.* 4*d.*, being the amount left unpaid of the two legacies of 10,000*l.* to Lady S. and S. By deed, dated the 6th of February, 1827, Lady S. and S. appointed the sum of 5833*l.* 6*s.* 8*d.*, which had been received by the executors, as above mentioned, to her husband, and also the residue, in default of further appointment, and died on the 6th of October, 1834, without having made any such appointment, leaving her husband her surviving; but, prior to her death, the 14,166*l.* was, by further payments, reduced to 11,452*l.* 5*s.* 3*d.* By indenture, dated the 12th of August, 1836, made between Lord S. and S., and T. F., his eldest son, the lands, &c., comprised in the said schedule A were conveyed, subject to the said term of one thousand years, for securing the said sum of 11,452*l.* 5*s.* 3*d.*, to the use of the said Lord S. and S. and T. F., and the survivor of them. On the 13th of November, 1844, Lord S. and S. died; whereupon the said son, T. F., became seized of the lands, &c., comprised in the deed of the 12th of August, 1836, and was entitled, as residuary legatee under the will of his father, to the said residue of the two legacies of 10,000*l.* By deed of the 10th of July, 1845, made between the surviving executors of A. B. and T. F., (then become Lord S. and S.) the said term created by the deed of the 6th of January, 1827, was surrendered and became merged in the inheritance, and Lord T. F. accepted the said merger in full satisfaction and discharge of the legacies of 10,000*l.* and 10,000*l.*, and the said residue was thereby satisfied and discharged:—

Held, that the legacy duty was payable by the executors of A. B. upon the whole 20,000*l.*, as so much of the 50,000*l.* as was required was personalty, and the transaction by which the term was merged amounted to a payment of the residue of the legacies.

THIS was an information for legacy duties claimed from the executors of the will of the late Sampson Lord Eardley, in respect of legacies given to his daughter, the late Lady Saye and Sele. The defendant pleaded *nil debet*, and after issue joined, by consent of the parties, the facts were stated in a special case for the opinion of the court.

Case. By deed of lease and release, dated the 9th of January, 1800, and made between Sampson Lord Eardley and Sampson Eardley Eardley, the eldest son and heir apparent of the said Sampson Lord Eardley, of the first part, John Wilmot and Thomas Rivett, Esqs., of the second part, the said Sir Thomas Blomefield of the third part, and Eardley Wilmot and Edward Ravenscroft, Esqs., of the fourth part, certain lands, tenements, and hereditaments particularly mentioned and described in the said indenture were released and conveyed by the said Sampson Lord Eardley and Sampson Eardley Eardley, amongst other things, subject to a power of revocation to the use of the said Sir Thomas William Blomefield for a term of one hundred years, for securing an annual rent charge of 2000*l.* to the said Sampson Eardley Eardley during the joint lives of himself and the said Sampson Lord Eardley, subject thereto to the use of the said Sampson Eardley Eardley and his sons in tail male, with divers remainders over.

By indenture, dated the 18th of May, 1814, and made between the said Sampson Lord Eardley of the first part, the said Sampson Eardley Eardley of the second part, the said John Wilmot (by the name of John Eardley Wilmot) and Thomas Rivett of the third part, and the said Edward Ravenscroft and Thomas Metcalfe of the fourth part, reciting, among other things, that the said Sampson Lord Eardley was not possessed of personal estate sufficient, in the event of his death, to discharge all the debts he might probably owe, and

The Attorney General v. Metcalfe & another.

such legacies as he might probably bequeath, without resorting to a sale of his family and other pictures, plate, and other articles of a similar nature, and that, therefore, the said Sampson Eardley Eardley had agreed, for the accommodation of the said Sampson Lord Eardley, to join with him in charging the said manors and other hereditaments which were then legally or equitably subject to the limitations contained in the said first-mentioned indenture, with the sum of 50,000*l.* sterling to be raised after the death of the said Sampson Lord Eardley, and applied in augmentation of his personal estate in manner in the said secondly-mentioned indenture mentioned, for effecting which purposes they had agreed to exercise the said power of revocation, and new appointment reserved to them by the said first-mentioned indenture; and that it had been agreed that the said Sampson Lord Eardley should assign to trustees the paintings, statues, bronzes, drawings, engravings, plate, china, and furniture in Belvidere House and Grosvenor Street House upon the trusts of the said secondly-mentioned indenture declared, they, the said Sampson Lord Eardley and Sampson Eardley Eardley, did revoke the trusts and powers in the indenture of the 9th of January, 1800, mentioned, and which were then subsisting and capable of taking effect, and did direct, limit, and appoint that all the said lands, tenements, and hereditaments should be and remain unto and to the use of the said Edward Ravenscroft and Thomas Metcalfe, their heirs and assigns, upon certain trusts during the life of the said Sampson Lord Eardley, and after his decease upon trust within six calendar months, to be computed from the day of his decease, by sale (and not by mortgage) of any competent part of the said manors and other hereditaments, to raise such sum, not exceeding 50,000*l.*, as should be necessary to make good the deficiency of the personal estate of the said Sampson Lord Eardley in payment of his debts and legacies, and in aid of the same, and should pay the sum so raised to his executors or administrators, to the intent that the same might be applied by them in aid of his personal estate for the purposes hereinbefore mentioned, upon trust to convey such of the said manors and hereditaments as should not be sold to the use of the said Sampson Eardley Eardley for life, with remainder to the use of the first and other sons of the said Sampson Eardley Eardley in tail male, with remainder, after divers limitations which did not take effect, as to one undivided third part of the said manors and hereditaments, to Maria Marow Eardley, Lady Saye and Sele, one of the daughters of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to one other undivided third part to Charlotte, wife of Sir Culling Smith, Bart., since deceased, another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to the other undivided third part, to Selina, wife of John Childers, Esq., another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over. The said Sampson Lord Eardley, with the privity of the said Sampson Eardley Eardley, then granted and assigned unto the said John Eardley

The Attorney General v. Metcalfe & another.

Wilmot and Thomas Rivett, their executors, administrators, and assigns, all those the said paintings, statues, bronzes, drawings, engravings, plate, china, and furniture, upon certain trusts therein specified.

On the 18th of May, 1814, a deed poll was made by the said Sampson Lord Eardley and Sampson Eardley Eardley, and indorsed on the said last-mentioned indenture, by which he appointed, that if the money and arrears of debts due to the said Sampson Lord Eardley at his decease, ground rents arising from houses or lands in London or Middlesex, shares of public funds and securities for money of which he should be possessed at his decease, should be insufficient for the payment of his debts and legacies, then neither any other part of his personal estate nor his real estate should be resorted to for making good the deficiency, until the whole of the said sum of 50,000*l.* should have been applied and exhausted in making good such deficiency. And on the 16th of December, 1823, by another deed poll, the said Sampson Lord Eardley and Sampson Eardley Eardley directed and appointed that a written declaration, signed by the executors or administrators of the said Sampson Lord Eardley, that the said sum of 50,000*l.*, or any portion of it, was, at the time of the making of the said declaration, wanted for the purpose for which the said sum of 50,000*l.* was made raisable as aforesaid, should be sufficient and conclusive evidence that the sum mentioned in the said declaration was so wanted for those purposes, and that the receipt of such executors or administrators should be a sufficient discharge for the same.

The said Sampson Lord Eardley, by his will, dated the 25th of June, 1814, amongst other things, gave and bequeathed unto the said John Eardley Wilmot, Samuel Compton Cox, Esq., since deceased, Francis Gosling, Esq., since deceased, and the said Thomas Metcalfe, their executors, administrators, and assigns, such sum of money as, within one month after the death of the said Sampson Lord Eardley, would purchase into their names the sum of 16,700*l.* bank 3*l.* per cent. annuities. And the said Sampson Lord Eardley thereby also gave to them, the said John Eardley Wilmot, Samuel Compton Cox, Esq., Francis Gosling, and Thomas Metcalfe, the sum of 10,000*l.* sterling, upon trust to transfer the said 16,700*l.* bank 3*l.* per cent. annuities when so purchased, and pay the said sum of 10,000*l.* to such persons and for such purposes only as, notwithstanding her coverture, the said Maria Marow Eardley, Lady Saye and Sele, the daughter of the said Sampson Lord Eardley, should by any deed appoint, and in default of appointment to her separate use.

The said Sampson Lord Eardley appointed the said John Eardley Wilmot, Samuel Compton Cox, Francis Gosling, and Thomas Metcalfe executors of his said last will.

On the 21st of December, A. D. 1820, the said Sampson Lord Eardley made a codicil to his said will, and thereby appointed the said Sir Thomas William Blomefield and William Gosling executors of his said last will and testament, instead of the said John Eardley Wilmot and Francis Gosling, who had before then died. And, on

The Attorney General v. Metcalfe & another.

the 22d of November, 1823, the said Sampson Lord Eardley made another codicil to his said will, and thereby gave and bequeathed the sum of 10,000*l.* sterling to the said Sir Thomas William Blomefield, William Gosling, Samuel Compton Cox, and Thomas Metcalfe, upon trust to stand possessed of the same upon such and the same trusts as the said 16,700*l.*

On the 16th of June, 1824, the said Sampson Lord Eardley made another codicil, and thereby revoked the said legacy of 16,700*l.* 3*l.* per cent. consolidated annuities so given in trust for the said Maria Marow Eardley, Lady Saye and Sele.

The said Sampson Eardley Eardley died on the 21st of May, 1824, without issue, and in the lifetime of his father, and the said Sampson Lord Eardley died on the 25th of December, 1824, without revoking or altering his said will and codicils as to the said appointment of executors as aforesaid, or as to the said bequests of 10,000*l.* and 10,000*l.* to the said Maria Marow Eardley, Lady Saye and Sele, and leaving the said Edward Ravenscroft, Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, William Gosling, and Maria Marow Eardley, Lady Saye and Sele, him surviving.

After the death of the said Sampson Lord Eardley, the said Edward Ravenscroft and Thomas Metcalfe became entitled to the said lands, tenements, and hereditaments, according to, and under, and by virtue of the said secondly-mentioned indenture of the 18th of May, 1814, upon trust as in the same indenture limited; and the said Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, and William Gosling duly proved the said will and codicils of the said Sampson Lord Eardley.

The personal estate of the said Sampson Lord Eardley was not sufficient for the payment of his debts and legacies without a part of the said sum of 50,000*l.*, that is to say, 43,687*l.* 8*s.* 5*d.*, being required in respect of three legacies, viz., 20,000*l.* to the said Lady Saye and Sele, 10,000*l.* to the said Dame Charlotte Smith, and 13,000*l.* to the said Selina Childers.

The said Samuel Compton Cox died on the 1st of January, 1827.

By virtue of common recoveries suffered in or as of Michaelmas term, 6 & 7 Geo. 4, the respective estates tail of William Thomas Twisleton Fiennes, the eldest son of the said Maria Marow Eardley, Lady Saye and Sele, of Culling Eardley Smith, the eldest son of the said Charlotte, wife of the said Sir Culling Smith, Bart., and of John Walbancke Childers, the eldest son of the said Selina, wife of the said John Childers, and the remainders and limitations over in the said several undivided thirds of the said manors and hereditaments of the said Sampson Lord Eardley, were barred. And by an indenture, dated the 11th of July, 1826, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and other necessary parties, it was agreed that a partition of the said manors and hereditaments of the said Sampson Lord Eardley in the said secondly-mentioned indenture of the 18th of May, 1814, comprised, should be carried into effect by and between the said three daughters of the said Sampson Lord Eardley.

The Attorney General v. Metcalfe & another.

On the 21st of July, 1826, the said partition of the said estates was duly carried into effect, and by an indenture bearing date the 20th of September, 1826, one undivided third part of the said manors and hereditaments of the said Sampson Lord Eardley by the said indenture of the 18th of May, 1814, limited to the use of the said Maria Marow Eardley, Lady Saye and Sele, for her life as aforesaid, was limited and settled to such uses as to the said Maria Marow Eardley, Lady Saye and Sele, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the said William Thomas Twisleton Fiennes, or the survivors of them, should jointly appoint. And by another indenture, bearing date the 6th of January, 1827, and made between the said Edward Ravenscroft and Thomas Metcalfe of the first part, the Right Hon. Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the Right Hon. Maria Marow Eardley, Baroness Saye and Sele, his wife, and the said William Thomas Twisleton Fiennes of the second part, the said Sir Culling Smith and Culling Eardley Smith of the third part, the said Selina Childers and John Walbancke Childers of the fourth part, Samuel Forster and John Cox of the fifth part, William Meyrick of the sixth part, the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling of the seventh part, and William Martin Forster of the eighth part, after reciting, as the facts were, that a partition of the said manors and hereditaments of the said Sampson Lord Eardley had been agreed upon and carried into effect, and that, by virtue of the said partition, certain manors and hereditaments in the schedule thereunto annexed mentioned had been allotted to the said Maria Marow Eardley, Lady Saye and Sele; and after reciting the payment of all the debts and legacies, except the legacies of 10,000*l.*, and 10,000*l.* in trust for the said Lady Saye and Sele, the said legacies were then raisable under the trusts therein mentioned and created for that purpose by sale of the entirety, or a sufficient part of the estates comprised in the said partition, but the parties interested had signified their desire that a sale should not take place, but that each undivided third part of the said estates, or a competent part thereof, should be charged with one third of the charges therein mentioned, and that Sir Culling Smith had paid 4666*l.* 13*s.* 4*d.*, and that the said John Walbancke Childers had paid 1166*l.* 13*s.* 4*d.* in part satisfaction of the respective third parts of the said legacies, it was witnessed, that the messuages, farms, lands, tenements, and hereditaments comprised in the schedule marked A, to the now-stating indenture annexed, were, with other hereditaments, conveyed to the use of the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling for the term of one thousand years from the day next before the day of the now-stating indenture. (and, subject to the said term, to the uses declared by the indenture of the 20th of September, 1826,) upon trust that they should, by mortgage, sale, or other disposition of all or any part of the said hereditaments, and out of the rents and profits thereof, raise the sum of 14,166*l.* 13*s.* 4*d.*, with interest at 5*l.* per cent. in full satisfaction, with the sums of 4666*l.* 13*s.* 4*d.*, and 1166*l.* 13*s.* 4*d.* paid to them the said trustees as aforesaid, of the

the 22d of November, 1823, the said Sampson Lord Eardley made another codicil to his said will, and thereby gave and bequeathed the sum of 10,000*l.* sterling to the said Sir Thomas William Blomefield, William Gosling, Samuel Compton Cox, and Thomas Metcalfe, upon trust to stand possessed of the same upon such and the same trusts as the said 16,700*l.*

On the 16th of June, 1824, the said Sampson Lord Eardley made another codicil, and thereby revoked the said legacy of 16,700*l.* 3*l.* per cent. consolidated annuities so given in trust for the said Maria Marow Eardley, Lady Saye and Sele.

The said Sampson Eardley Eardley died on the 21st of May, 1824, without issue, and in the lifetime of his father, and the said Sampson Lord Eardley died on the 25th of December, 1824, without revoking or altering his said will and codicils as to the said appointment of executors as aforesaid, or as to the said bequests of 10,000*l.*, and 10,000*l.* to the said Maria Marow Eardley, Lady Saye and Sele, and leaving the said Edward Ravenscroft, Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, William Gosling, and Maria Marow Eardley, Lady Saye and Sele, him surviving.

After the death of the said Sampson Lord Eardley, the said Edward Ravenscroft and Thomas Metcalfe became entitled to the said lands, tenements, and hereditaments, according to, and under, and by virtue of the said secondly-mentioned indenture of the 18th of May, 1814, upon trust as in the same indenture limited; and the said Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, and William Gosling duly proved the said will and codicils of the said Sampson Lord Eardley.

The personal estate of the said Sampson Lord Eardley was not sufficient for the payment of his debts and legacies without a part of the said sum of 50,000*l.*, that is to say, 43,687*l.* 8*s.* 5*d.*, being required in respect of three legacies, viz., 20,000*l.* to the said Lady Saye and Sele, 10,000*l.* to the said Dame Charlotte Smith, and 13,000*l.* to the said Selina Childers.

The said Samuel Compton Cox died on the 1st of January, 1827.

By virtue of common recoveries suffered in or as of Michaelmas term, 6 & 7 Geo. 4, the respective estates tail of William Thomas Twisleton Fiennes, the eldest son of the said Maria Marow Eardley, Lady Saye and Sele, of Culling Eardley Smith, the eldest son of the said Charlotte, wife of the said Sir Culling Smith, Bart., and of John Walbancke Childers, the eldest son of the said Selina, wife of the said John Childers, and the remainders and limitations over in the said several undivided thirds of the said manors and hereditaments of the said Sampson Lord Eardley, were barred. And by an indenture, dated the 11th of July, 1826, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and other necessary parties, it was agreed that a partition of the said manors and hereditaments of the said Sampson Lord Eardley in the said secondly-mentioned indenture of the 18th of May, 1814, comprised, should be carried into effect by and between the said three daughters of the said Sampson Lord Eardley.

The Attorney General v. Metcalfe & another.

On the 21st of July, 1826, the said partition of the said estates was duly carried into effect, and by an indenture bearing date the 20th of September, 1826, one undivided third part of the said manors and hereditaments of the said Sampson Lord Eardley by the said indenture of the 18th of May, 1814, limited to the use of the said Maria Marow Eardley, Lady Saye and Sele, for her life as aforesaid, was limited and settled to such uses as to the said Maria Marow Eardley, Lady Saye and Sele, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the said William Thomas Twisleton Fiennes, or the survivors of them, should jointly appoint. And by another indenture, bearing date the 6th of January, 1827, and made between the said Edward Ravenscroft and Thomas Metcalfe of the first part, the Right Hon. Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the Right Hon. Maria Marow Eardley, Baroness Saye and Sele, his wife, and the said William Thomas Twisleton Fiennes of the second part, the said Sir Culling Smith and Culling Eardley Smith of the third part, the said Selina Childers and John Walbancke Childers of the fourth part, Samuel Forster and John Cox of the fifth part, William Meyrick of the sixth part, the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling of the seventh part, and William Martin Forster of the eighth part, after reciting, as the facts were, that a partition of the said manors and hereditaments of the said Sampson Lord Eardley had been agreed upon and carried into effect, and that, by virtue of the said partition, certain manors and hereditaments in the schedule thereunto annexed mentioned had been allotted to the said Maria Marow Eardley, Lady Saye and Sele; and after reciting the payment of all the debts and legacies, except the legacies of 10,000*l.*, and 10,000*l.* in trust for the said Lady Saye and Sele, the said legacies were then raisable under the trusts therein mentioned and created for that purpose by sale of the entirety, or a sufficient part of the estates comprised in the said partition, but the parties interested had signified their desire that a sale should not take place, but that each undivided third part of the said estates, or a competent part thereof, should be charged with one third of the charges therein mentioned, and that Sir Culling Smith had paid 4666*l.* 13*s.* 4*d.*, and that the said John Walbancke Childers had paid 1166*l.* 13*s.* 4*d.* in part satisfaction of the respective third parts of the said legacies, it was witnessed, that the messuages, farms, lands, tenements, and hereditaments comprised in the schedule marked A, to the now-stating indenture annexed, were, with other hereditaments, conveyed to the use of the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling for the term of one thousand years from the day next before the day of the now-stating indenture. (and, subject to the said term, to the uses declared by the indenture of the 20th of September, 1826,) upon trust that they should, by mortgage, sale, or other disposition of all or any part of the said hereditaments, and out of the rents and profits thereof, raise the sum of 14,166*l.* 13*s.* 4*d.*, with interest at 5*l.* per cent. in full satisfaction, with the sums of 4666*l.* 13*s.* 4*d.*, and 1166*l.* 13*s.* 4*d.* paid to them the said trustees as aforesaid, of the

legacies amounting to 20,000*l.* bequeathed in trust for the said Maria Marow Eardley, Lady Saye and Sele, as aforesaid.

By a deed poll, dated the 6th of February, 1827, made by the said Maria Marow Eardley, Lady Saye and Sele, in order to enable her said husband to receive the two sums of 4666*l.* 13*s.* 4*d.* and 1166*l.* 13*s.* 4*d.*, making together 5833*l.* 6*s.* 8*d.*, and in exercise of the power for that purpose given to her by the said will and codicils of the said Lord Eardley, the said Maria Marow Eardley, Lady Saye and Sele, did appoint that the said sum of 5833*l.* 6*s.* 8*d.*, parcel of the said several sums of 10,000*l.* and 10,000*l.*, should be paid to her husband, and the residue as she should appoint, and in default of appointment it should be paid to her husband.

The said Samuel Compton Cox died on the 1st of January, 1827, and the said William Gosling died on the 27th of January, 1834, and the said Maria Marow Eardley, Lady Saye and Sele, died on the 6th of October, 1834, without further exercising the power of appointment in herself reserved as aforesaid, leaving her said husband, Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, her surviving.

After the death of Lady Saye and Sele, and before the decease of the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, by further payments, the said sum of 14,166*l.* 13*s.* 4*d.* became reduced to the sum of 11,462*l.* 5*s.* 3*d.*

By an indenture, bearing date the 12th of August, 1836, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, of the first part, and his son William Thomas Twisleton Fiennes, of the second part, the manors and hereditaments comprised in the said schedule marked A, to the above-stated indenture of the 6th of January, 1827, were appointed and conveyed by the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and William Thomas Twisleton Fiennes, subject to the said term of one thousand years, for securing 11,452*l.* 5*s.* 3*d.*, being the residue of the said several sums of 10,000*l.* and 10,000*l.* then remaining unpaid, to the use of them, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and William Thomas Twisleton Fiennes, and the survivor of them in fee.

On the 13th of November, 1844, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, died, whereupon his said son William Thomas Twisleton Fiennes became Lord Saye and Sele, and then became and was seized of the said last-mentioned manors and hereditaments in the said indenture of the 12th of August, 1836, comprised, and also became and was entitled as residuary legatee, under the will of his said father, to the residue of the said several sums of 10,000*l.* and 10,000*l.* then remaining raisable under the trusts of the said term of one thousand years, that is to say, 11,452*l.* 5*s.* 3*d.*

The said William Thomas Twisleton Fiennes, Lord Saye and Sele, was desirous that the money in question should not be actually raised out of the said estates so vested in him, but that the charge should be merged in the said estates, and that the said estates should be

The Attorney General v. Metcalfe & another.

exonerated from the said charge; and it was therefore agreed amongst all the parties, that such object should be effected by the deed next hereinafter stated, and that the said William Thomas Twisleton Fiennes, Lord Saye and Sele, should accept such merger of the said charge out of the term of one thousand years from the said Thomas Metcalfe and Sir Thomas William Blomefield, as a satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*

In pursuance of such agreement, and by an indenture bearing date the 10th of July, 1845, made between the said Thomas Metcalfe and Sir Thomas William Blomefield of the one part, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, of the other part, the said term by the said indenture of the 6th of January, 1827, granted, was surrendered and became merged in the inheritance, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, then accepted and received the said merger and the said execution of the said deed poll in full satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*, and, by means of the foregoing proceedings and of the said surrender, the residue of the said legacies of 10,000*l.* and 10,000*l.* became satisfied and discharged, according to the true intent and meaning of the said last will and testament and codicils of the said Sampson Lord Eardley, and of the said secondly-mentioned indenture of the 8th of May, 1814.

The said Maria Marow Eardley, Lady Saye and Sele, was a daughter of the said testator Sampson Lord Eardley.

The commissioners of inland revenue claim and demand from the said Thomas Metcalfe and Sir Thomas William Blomefield payment of 200*l.*, as the amount of duty payable in respect of the said legacies of 10,000*l.* and 10,000*l.* so satisfied as aforesaid; but the said Thomas Metcalfe and Sir Thomas William Blomefield refuse to pay the same or any part thereof.

The question for the opinion of the court was, whether any and what amount of legacy duty was payable under the above circumstances. If the court should be of opinion that legacy duty was payable, then judgment would be entered for the crown for such sum as should be so considered to be payable. If the court should be of a contrary opinion, then a *nolle prosequi* was to be entered.

Crompton, for the crown. The duty has been paid upon the 8547*l.* 14*s.* 9*d.*, and the question is as to the residue. Both the sums of 10,000*l.* are pecuniary legacies left by the will, and there is nothing in the statute to exempt them. They are legacies of personalty, and the accident that the estate was not sold does not affect the right of the crown to the duty.

[*Martin*, B. Is it not as if A. had an estate subject to a charge to B., and B. bequeathed the charge to A. ?]

Yes; and *The Attorney General v. Holford*, 1 Price, 426, decides, that where the party beneficially interested elects to take the estate in specie, the duty is still payable, just as if the estate had been sold. There is a satisfaction of the legacy within the meaning of the 36

The Attorney General v. Metcalfe & another.

Geo. 3, c. 52, and 45 Geo. 3, c. 28.¹ (He was then stopped by the court.)

A. Mills, contra. This is not a legacy of personal estate. There is no absolute direction to sell, and the property is realty, and not personalty. In *Cathcart v. Cathcart*, 8 Shaw & Dun. 803, the testator left his estate, both heritable and movable, to trustees, for the purpose of paying debts and legacies, with a power, but no direction to sell, and provided that the residue should then belong to his brother and his heirs, who were appointed residuary legatees, to whom the trustees were directed to dispose, assign, and pay it over. Having left movable property sufficient, after satisfying the debts and legacies, to leave a balance, and the heritage remaining unconverted into money, and the brother having predeceased the testator, it was held,

¹ The 36 Geo. 3, c. 52, s. 6, enacts, "That the duties shall, in all cases where it is not otherwise provided, be accounted for, answered, and paid by the person having or taking the burden of the execution of the will, &c., upon retainer, for his own benefit, or for the benefit of any other person, of any legacy, or part of any legacy, which he shall be entitled to retain, and upon delivery, payment, or other satisfaction, or discharge whatsoever of any legacy, or any part of any legacy, to which any other person shall be entitled; and, in case he shall so retain any such legacy, or part of any legacy, not having first paid the duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or part of any legacy, having received or deducted the duty, such duty shall be a debt due from him to his majesty; and if he shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or part of any legacy, to or for the benefit of any person entitled thereto, without having received or deducted the duty, such duty shall be a debt both from him and the person to whom the delivery, payment, satisfaction, or discharge shall be made."

The 45 Geo. 3, c. 28, s. 4, enacts, "That every gift, by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon, or made payable out of, any real estate, or directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy, within the true intent and meaning of this act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement, or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument, under any power given for that purpose by any such marriage settlement or deed or deeds."

Sect. 5 enacts, "That the duties thereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, or upon residues, or parts or shares of residues, of any such moneys, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies or share or shares of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or, if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy or share of money, in like manner and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in the 36 Geo. 3, c. 52."

that the heir at law of the brother was entitled to the whole of the residue, consisting of heritage. The fund is not created by the will, and what has been given to Lady Saye and Sele was by virtue of the power, and not by the will. *Pickard v. The Attorney General*, 6 Mee. & W. 348; s. c. 9 Law J. Rep. (n. s.) Exch. 329. *The Attorney General v. Hertford*, 14 Mee. & W. 284; s. c. 14 Law J. Rep. (n. s.) Exch. 266. Unless there is a positive direction by the will to sell, legacy duty does not attach. *In re Evans*, 2 Cr. M. & R. 206; s. c. 4 Law J. Rep. (n. s.) Exch. 201. In *The Attorney General v. Mangles*, 5 Mee. & W. 120, which appears to be opposed to *In re Evans*, the trustees were ordered to sell; but it is submitted that the former case is correct.

[*Parke, B.* This court has decided in the *The Attorney General v. Simcox*, 1 Exch. Rep. 749; s. c. 18 Law J. Rep. (n. s.) Exch. 61, that *In re Evans* is wrong, if it be supposed to decide that the duty only attaches when the trustees are bound to sell, and have no discretion on the subject.]

In *The Attorney General v. Mangles*, the duty was not payable upon the part which was not sold. Unless there is an absolute intention to convert the realty into personalty, the duty does not attach. *Williamson v. The Advocate General*, 10 Cl. & F. 1. *Creed v. Creed*, 11 Cl. & F. 491, was also cited. The money not having been raised by the sale, there is no payment, satisfaction, or discharge within the 36 Geo. 3, c. 52, s. 6.

POLLOCK, C. B. We are all of opinion that the crown is entitled to judgment in this case. Although none of the cases cited are precisely in point, still the question, when examined, is free from all doubt. In the year 1800, Lord Eardley settled his estates. At that time he had much personal property, but he was desirous, in case that property should be left chargeable with debts and legacies, that it should not be alienated from his real estates, and to effect that object he made a bargain with his son in the year 1814. He knew that his son would be desirous of having the ornamental furniture, pictures, and other matters of that description, but feeling at the same time that the personal property, if so disposed of, would not be sufficient to satisfy the objects of his generosity and the claims of justice by discharging his debts and legacies, he, therefore, made a bargain with his son to increase his own personal estate, and to let him have the furniture and other matters I have mentioned. The language of the deed of 1814 is to the express effect that the sum of 50,000*l.* is to be raised after the death of the said Lord Eardley, to be applied in augmentation of his personal estate. Then, by the arrangement, he transfers to trustees all those matters which then formed part of his personal estate, and in return he receives a power to charge the estate to the extent of 50,000*l.*, in which, at that time, he had merely a life interest. That was in substance a mortgage, which is personal estate. If he had given a legacy to A. B. out of this fund, it would have been payable out of what was expressly said by Lord Eardley himself to be in augmentation of his personal estate. Such, there-

Lowe v. Carpenter.

c. 71) as intending that the periods of years mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is, perhaps, rather apparent than real."

So in *Onley v. Gardiner*, 4 M. & W. 496, Parke, B., in delivering judgment, says, "The plea of actual enjoyment as of right of a way over the *locus in quo*, for twenty years next before the commencement of the suit, cannot be supported. We are all clearly of opinion that, in order to entitle the defendant to the benefit of the statutory plea, it must be an enjoyment of the easement *as such*, and as of right, for a *continuous period of twenty years next before the suit*, without such interruption as is defined in the act." In *Jones v. Price*, 3 Bing. N. C. 52, Tindal, C. J., says, "It seems to me that the 4th section of the stat. 2 & 3 Will. 4, c. 71, is nothing but an exposition of the proof required to establish the right. It is a mere question of evidence, and if the plaintiff joins in the issue now offered, the defendant will not be able to get out of the proof of the enjoyment of the right for thirty years next before the action." *Rickards v. Fry*, 7 Ad. & El. 698, is the converse of that case. [He relied on *Parker v. Mitchell* as being expressly in point, and cited the language of this court in *Ward v. Robins*, 15 M. & W. 237; and Alderson, B., referred to *Bailey v. Appleyard*, 8 Ad. & El. 161, 779.] The case of *Carr v. Foster* is distinguishable in several ways. First, there was evidence of usage from the *terminus a quo* to the *terminus ad quem*, the interruption being at an intermediate point of time. Secondly, the declaration was general, and might have been supported by proof of an immemorial right, independently of the statute. Thirdly, it was under a different section of the statute; and a right of common differs from a right of way in this, that it is used over different pieces of ground each year. Fourthly, the nonuser there was explained by showing that the owner of the right of common had no cattle during the time.

PARKE, B. This rule must be made absolute to enter the verdict for the plaintiff, with nominal damages, unless the defendant will pay the costs of the action and amend his pleadings by putting on the record a plea of a non-existing grant or prescription, if he thinks his evidence will support it. *Parker v. Mitchell* is, in fact, precisely in point. If there had been no decision on the subject, I should have been disposed to think that the stat. 2 & 3 Will. 4, c. 71, applied to cases where there has been a frequent exercise of the supposed right, once a year at least; for there is a clause in the statute, that "no act, or other matter shall be deemed an interruption unless submitted to, or acquiesced in, for one year," which evidently points to that description of right which is exercised at least once a year, and, if interrupted for a year, is defeated. But *Parker v. Mitchell* says there must be some enjoyment of the right at the end as well as at the beginning of the period, which means, I think, some actual, not

Lowe v. Carpenter.

constructive, enjoyment during that period. There is certainly some difficulty in reconciling that decision with the subsequent decision in *Carr v. Foster*, though they may, perhaps, be reconciled by taking a distinction between enjoyment in the beginning, at the end, and in the middle of the term. If, however, it were necessary to decide that the two cases were irreconcilable, I think the more correct view would be, that no right could be obtained unless a user at least once a year during twenty, thirty, or forty years, as the case may be, were proved. No doubt there is great difficulty in carrying the statute into effect, and this shows how extremely difficult it is to alter the law so as to put an end to questions, the effect of the alteration often being to raise more questions than there were before. I think *Parker v. Mitchell* quite in point, and am by no means satisfied that it is wrong; and if so, this plea has not been proved, and the verdict must be entered for the plaintiff. No doubt the statute requires in words (as already explained in *Ward v. Robins*) that the period of time of enjoyment should be the whole period of twenty, thirty years, &c., and that it should continue up to the commencement of the suit. It is quite impossible to have actual enjoyment up to the very moment, or even within a day or a week of the time when the action was brought; and I think the true construction of the statute is, that some such act must have taken place within the year.

ALDERSON, B. I am of the same opinion. *Parker v. Mitchell* decides that enjoyment during the last year is material; *Bailey v. Appleyard* says the first year also is material; and *Carr v. Foster* seems to intimate that the intermediate ones are not so. Whether that distinction be sound or not, it certainly is a convenient one, for it is easy to prove enjoyment at the beginning or the end of the term — one or two witnesses would suffice for that; but it might require forty witnesses if such proof were required for every year between those limits.

PLATT, B. The statute says no right shall be gained except by enjoyment for the full periods specified in the several sections; and the 4th section distinctly points out the time from which the enjoyment is to run. In the present case, proof has not been given of such enjoyment; and, therefore, in accordance with the statute, and the decision in *Parker v. Mitchell*, which seems to me to be good law, this rule must be made absolute.

MARTIN, B. The question turns on the construction of this statute, which should be construed according to the plain grammatical meaning of the words. It says the right must arise from actual enjoyment during a certain number of years previous to the commencement of the suit; and the 4th section, as my brother Platt has observed, points out the time from which the calculation is to be made. How is it possible a man can be said to have enjoyed the thing, if the two are deficient? I think *Parker v. Mitchell* was

The Attorney General v. Metcalfe & another.

rightly decided, and the judgment in *Ward v. Robins* gives the true view of this matter.

Rule absolute to enter a verdict for the plaintiff, with nominal damages, unless the defendant within a fortnight gives notice to the plaintiff that he wishes to have a new trial on payment of costs, and then the defendant to be at liberty to add pleas of a right by prescription and non-existing grant. The costs to be paid on adding the pleas, and the defendant to take such notice of trial as the plaintiff can give.

THE ATTORNEY GENERAL v. METCALFE & another.¹

Hilary Term, January 24, 1851.

Legacy Duty — Discretion of Trustees to sell — Payment and Satisfaction of Legacy.

A. B. and C. his eldest son and heir apparent, by indenture dated the 9th of January, 1800, joined in conveying certain lands and hereditaments of A. B. to trustees, for a term of one hundred years, subject to certain trusts during the joint lives of A. B. and C., and with power of revocation, and with divers remainders over. By indenture of the 18th of May, 1814, reciting, *inter alia*, that A. B. was not possessed of sufficient personal estate to pay the debts he might owe and the legacies he might bequeath at his death, without the sale of his family pictures, &c., A. B. and C., after revoking the trusts of the deed of the 9th of January, 1800, appointed that the said lands, &c., should be held by certain trustees, in trust, to sell within six months after the death of A. B. so much as would raise a sum necessary for the payment of his debts and legacies, not exceeding 50,000*l.*, the same to be paid to his executors and applied in aid of his personal estate, (only certain portions of which personal estate were, by deed poll of the 18th of May, 1814, directed to be used prior to such 50,000*l.* being raised,) with a further trust to convey what should not be sold to C. for life, with certain remainders and limitations, and in default of such taking effect, with remainder, as to one undivided third to Lady S. and S., a daughter of A. B., for life with remainders to her sons, in tail; and as to the two other undivided thirds to D. and E., two other daughters of A. B., severally, with divers remainders over. By will, dated the 25th of June, 1814, and several subsequent codicils, A. B. appointed M. and others executors, and bequeathed to them two sums of 10,000*l.*, in trust, for such purposes as, notwithstanding her coverture, Lady S. and S. should appoint, and, in default of appointment, to her separate use. C. died in the lifetime of A. B., without issue, and A. B. himself died the 25th of December, 1824, without altering his said will and codicils, and leaving Lady S. and S., D. and E., respectively married and surviving. The personal estate of A. B. was insufficient for the payment of his debts and legacies without part of the 50,000*l.* being raised. By virtue of common recoveries, the respective estates tail of the sons of Lady S. and S., C. D. and E. were barred; and by deed, dated the 11th of July, 1826, between all necessary parties, it was agreed that a partition of the estates mentioned in the deed of the 18th of May, 1814, should take place.

The partition was accordingly effected by deed of the 21st of July, 1826, and by indenture of the 20th of September, 1826, one undivided third part was settled to such uses as Lady S. and S., her husband, and her eldest son, J. F., &c., or the survivor of them, should appoint. By deed of January, 1827, between Lady S. and S., D. and E., and their respective husbands and other necessary parties, after reciting that a partition had taken place, and certain lands, &c., were allotted to Lady S. and S.; that the debts and legacies had been paid, except the two sums of 10,000*l.*, which were raisable by sale of so much of the estate as might be required, but that the parties had agreed that, instead of a sale taking place, each undivided third part should be charged with one third of such legacies; that certain sums had been paid to the executors of A. B., in part satisfaction of two of the respective

¹ 20 Law J. Rep. (n. s.) Exch. 329.

The Attorney General v. Metcalfe & another.

third parts, it was witnessed that certain lands, specified in a schedule annexed to the deed marked A, were conveyed to the use of the executors of the will of A. B., for a term of one thousand years, and subject thereto to the uses declared by the indenture of the 20th of September, 1826, upon trust, to raise, by mortgage or sale, the sum of 14,166*l.* 13*s.* 4*d.*, being the amount left unpaid of the two legacies of 10,000*l.* to Lady S. and S. By deed, dated the 6th of February, 1827, Lady S. and S. appointed the sum of 5833*l.* 6*s.* 8*d.*, which had been received by the executors, as above mentioned, to her husband, and also the residue, in default of further appointment, and died on the 6th of October, 1834, without having made any such appointment, leaving her husband her surviving; but, prior to her death, the 14,166*l.* was, by further payments, reduced to 11,452*l.* 5*s.* 3*d.* By indenture, dated the 12th of August, 1836, made between Lord S. and S., and T. F., his eldest son, the lands, &c., comprised in the said schedule A were conveyed, subject to the said term of one thousand years, for securing the said sum of 11,452*l.* 5*s.* 3*d.*, to the use of the said Lord S. and S. and T. F., and the survivor of them. On the 13th of November, 1844, Lord S. and S. died; whereupon the said son, T. F., became seized of the lands, &c., comprised in the deed of the 12th of August, 1836, and was entitled, as residuary legatee under the will of his father, to the said residue of the two legacies of 10,000*l.* By deed of the 10th of July, 1845, made between the surviving executors of A. B. and T. F., (then become Lord S. and S.) the said term created by the deed of the 6th of January, 1827, was surrendered and became merged in the inheritance, and Lord T. F. accepted the said merger in full satisfaction and discharge of the legacies of 10,000*l.* and 10,000*l.*, and the said residue was thereby satisfied and discharged:—

Held, that the legacy duty was payable by the executors of A. B. upon the whole 20,000*l.*, as so much of the 50,000*l.* as was required was personalty, and the transaction by which the term was merged amounted to a payment of the residue of the legacies.

THIS was an information for legacy duties claimed from the executors of the will of the late Sampson Lord Eardley, in respect of legacies given to his daughter, the late Lady Saye and Sele. The defendant pleaded *nil debet*, and after issue joined, by consent of the parties, the facts were stated in a special case for the opinion of the court.

Case. By deed of lease and release, dated the 9th of January, 1800, and made between Sampson Lord Eardley and Sampson Eardley Eardley, the eldest son and heir apparent of the said Sampson Lord Eardley, of the first part, John Wilmot and Thomas Rivett, Esqs., of the second part, the said Sir Thomas Blomefield of the third part, and Eardley Wilmot and Edward Ravenscroft, Esqs., of the fourth part, certain lands, tenements, and hereditaments particularly mentioned and described in the said indenture were released and conveyed by the said Sampson Lord Eardley and Sampson Eardley Eardley, amongst other things, subject to a power of revocation to the use of the said Sir Thomas William Blomefield for a term of one hundred years, for securing an annual rent charge of 2000*l.* to the said Sampson Eardley Eardley during the joint lives of himself and the said Sampson Lord Eardley, subject thereto to the use of the said Sampson Eardley Eardley and his sons in tail male, with divers remainders over.

By indenture, dated the 18th of May, 1814, and made between the said Sampson Lord Eardley of the first part, the said Sampson Eardley Eardley of the second part, the said John Wilmot (by the name of John Eardley Wilmot) and Thomas Rivett of the third part, and the said Edward Ravenscroft and Thomas Metcalfe of the fourth part, reciting, among other things, that the said Sampson Lord Eardley was not possessed of personal estate sufficient, in the event of his death, to discharge all the debts he might probably owe, and

The Attorney General v. Metcalfe & another.

such legacies as he might probably bequeath, without resorting to a sale of his family and other pictures, plate, and other articles of a similar nature, and that, therefore, the said Sampson Eardley Eardley had agreed, for the accommodation of the said Sampson Lord Eardley, to join with him in charging the said manors and other hereditaments which were then legally or equitably subject to the limitations contained in the said first-mentioned indenture, with the sum of 50,000*l.* sterling to be raised after the death of the said Sampson Lord Eardley, and applied in augmentation of his personal estate in manner in the said secondly-mentioned indenture mentioned, for effecting which purposes they had agreed to exercise the said power of revocation, and new appointment reserved to them by the said first-mentioned indenture; and that it had been agreed that the said Sampson Lord Eardley should assign to trustees the paintings, statues, bronzes, drawings, engravings, plate, china, and furniture in Belvidere House and Grosvenor Street House upon the trusts of the said secondly-mentioned indenture declared, they, the said Sampson Lord Eardley and Sampson Eardley Eardley, did revoke the trusts and powers in the indenture of the 9th of January, 1800, mentioned, and which were then subsisting and capable of taking effect, and did direct, limit, and appoint that all the said lands, tenements, and hereditaments should be and remain unto and to the use of the said Edward Ravenscroft and Thomas Metcalfe, their heirs and assigns, upon certain trusts during the life of the said Sampson Lord Eardley, and after his decease upon trust within six calendar months, to be computed from the day of his decease, by sale (and not by mortgage) of any competent part of the said manors and other hereditaments, to raise such sum, not exceeding 50,000*l.*, as should be necessary to make good the deficiency of the personal estate of the said Sampson Lord Eardley in payment of his debts and legacies, and in aid of the same, and should pay the sum so raised to his executors or administrators, to the intent that the same might be applied by them in aid of his personal estate for the purposes hereinbefore mentioned, upon trust to convey such of the said manors and hereditaments as should not be sold to the use of the said Sampson Eardley Eardley for life, with remainder to the use of the first and other sons of the said Sampson Eardley Eardley in tail male, with remainder, after divers limitations which did not take effect, as to one undivided third part of the said manors and hereditaments, to Maria Marow Eardley, Lady Saye and Sele, one of the daughters of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to one other undivided third part to Charlotte, wife of Sir Culling Smith, Bart., since deceased, another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to the other undivided third part, to Selina, wife of John Childers, Esq., another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over. The said Sampson Lord Eardley, with the privity of the said Sampson Eardley Eardley, then granted and assigned unto the said John Eardley

The Attorney General v. Metcalfe & another.

Wilmot and Thomas Rivett, their executors, administrators, and assigns, all those the said paintings, statues, bronzes, drawings, engravings, plate, china, and furniture, upon certain trusts therein specified.

On the 18th of May, 1814, a deed poll was made by the said Sampson Lord Eardley and Sampson Eardley Eardley, and indorsed on the said last-mentioned indenture, by which he appointed, that if the money and arrears of debts due to the said Sampson Lord Eardley at his decease, ground rents arising from houses or lands in London or Middlesex, shares of public funds and securities for money of which he should be possessed at his decease, should be insufficient for the payment of his debts and legacies, then neither any other part of his personal estate nor his real estate should be resorted to for making good the deficiency, until the whole of the said sum of 50,000*l.* should have been applied and exhausted in making good such deficiency. And on the 16th of December, 1823, by another deed poll, the said Sampson Lord Eardley and Sampson Eardley Eardley directed and appointed that a written declaration, signed by the executors or administrators of the said Sampson Lord Eardley, that the said sum of 50,000*l.*, or any portion of it, was, at the time of the making of the said declaration, wanted for the purpose for which the said sum of 50,000*l.* was made raisable as aforesaid, should be sufficient and conclusive evidence that the sum mentioned in the said declaration was so wanted for those purposes, and that the receipt of such executors or administrators should be a sufficient discharge for the same.

The said Sampson Lord Eardley, by his will, dated the 25th of June, 1814, amongst other things, gave and bequeathed unto the said John Eardley Wilmot, Samuel Compton Cox, Esq., since deceased, Francis Gosling, Esq., since deceased, and the said Thomas Metcalfe, their executors, administrators, and assigns, such sum of money as, within one month after the death of the said Sampson Lord Eardley, would purchase into their names the sum of 16,700*l.* bank 3*l.* per cent. annuities. And the said Sampson Lord Eardley thereby also gave to them, the said John Eardley Wilmot, Samuel Compton Cox, Esq., Francis Gosling, and Thomas Metcalfe, the sum of 10,000*l.* sterling, upon trust to transfer the said 16,700*l.* bank 3*l.* per cent. annuities when so purchased, and pay the said sum of 10,000*l.* to such persons and for such purposes only as, notwithstanding her coverture, the said Maria Marow Eardley, Lady Saye and Sele, the daughter of the said Sampson Lord Eardley, should by any deed appoint, and in default of appointment to her separate use.

The said Sampson Lord Eardley appointed the said John Eardley Wilmot, Samuel Compton Cox, Francis Gosling, and Thomas Metcalfe executors of his said last will.

On the 21st of December, A. D. 1820, the said Sampson Lord Eardley made a codicil to his said will, and thereby appointed the said Sir Thomas William Blomefield and William Gosling executors of his said last will and testament, instead of the said John Eardley Wilmot and Francis Gosling, who had before then died. And, on

The Attorney General v. Metcalfe & another.

the 22d of November, 1823, the said Sampson Lord Eardley made another codicil to his said will, and thereby gave and bequeathed the sum of 10,000*l.* sterling to the said Sir Thomas William Blomefield, William Gosling, Samuel Compton Cox, and Thomas Metcalfe, upon trust to stand possessed of the same upon such and the same trusts as the said 16,700*l.*

On the 16th of June, 1824, the said Sampson Lord Eardley made another codicil, and thereby revoked the said legacy of 16,700*l.* 3*l.* per cent. consolidated annuities so given in trust for the said Maria Marow Eardley, Lady Saye and Sele.

The said Sampson Eardley Eardley died on the 21st of May, 1824, without issue, and in the lifetime of his father, and the said Sampson Lord Eardley died on the 25th of December, 1824, without revoking or altering his said will and codicils as to the said appointment of executors as aforesaid, or as to the said bequests of 10,000*l.*, and 10,000*l.* to the said Maria Marow Eardley, Lady Saye and Sele, and leaving the said Edward Ravenscroft, Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, William Gosling, and Maria Marow Eardley, Lady Saye and Sele, him surviving.

After the death of the said Sampson Lord Eardley, the said Edward Ravenscroft and Thomas Metcalfe became entitled to the said lands, tenements, and hereditaments, according to, and under, and by virtue of the said secondly-mentioned indenture of the 18th of May, 1814, upon trust as in the same indenture limited; and the said Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, and William Gosling duly proved the said will and codicils of the said Sampson Lord Eardley.

The personal estate of the said Sampson Lord Eardley was not sufficient for the payment of his debts and legacies without a part of the said sum of 50,000*l.*, that is to say, 43,687*l.* 8*s.* 5*d.*, being required in respect of three legacies, viz., 20,000*l.* to the said Lady Saye and Sele, 10,000*l.* to the said Dame Charlotte Smith, and 13,000*l.* to the said Selina Childers.

The said Samuel Compton Cox died on the 1st of January, 1827.

By virtue of common recoveries suffered in or as of Michaelmas term, 6 & 7 Geo. 4, the respective estates tail of William Thomas Twisleton Fiennes, the eldest son of the said Maria Marow Eardley, Lady Saye and Sele, of Culling Eardley Smith, the eldest son of the said Charlotte, wife of the said Sir Culling Smith, Bart., and of John Walbancke Childers, the eldest son of the said Selina, wife of the said John Childers, and the remainders and limitations over in the said several undivided thirds of the said manors and hereditaments of the said Sampson Lord Eardley, were barred. And by an indenture, dated the 11th of July, 1826, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and other necessary parties, it was agreed that a partition of the said and hereditaments of the said Sampson Lord Eardley in the said secondly-mentioned indenture of the 18th of May, 1814, should be carried into effect by and between the said three of the said Sampson Lord Eardley.

The Attorney General v. Metcalfe & another.

On the 21st of July, 1826, the said partition of the said estates was duly carried into effect, and by an indenture bearing date the 20th of September, 1826, one undivided third part of the said manors and hereditaments of the said Sampson Lord Eardley by the said indenture of the 18th of May, 1814, limited to the use of the said Maria Marow Eardley, Lady Saye and Sele, for her life as aforesaid, was limited and settled to such uses as to the said Maria Marow Eardley, Lady Saye and Sele, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the said William Thomas Twisleton Fiennes, or the survivors of them, should jointly appoint. And by another indenture, bearing date the 6th of January, 1827, and made between the said Edward Ravenscroft and Thomas Metcalfe of the first part, the Right Hon. Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the Right Hon. Maria Marow Eardley, Baroness Saye and Sele, his wife, and the said William Thomas Twisleton Fiennes of the second part, the said Sir Culling Smith and Culling Eardley Smith of the third part, the said Selina Childers and John Walbancke Childers of the fourth part, Samuel Forster and John Cox of the fifth part, William Meyrick of the sixth part, the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling of the seventh part, and William Martin Forster of the eighth part, after reciting, as the facts were, that a partition of the said manors and hereditaments of the said Sampson Lord Eardley had been agreed upon and carried into effect, and that, by virtue of the said partition, certain manors and hereditaments in the schedule thereunto annexed mentioned had been allotted to the said Maria Marow Eardley, Lady Saye and Sele; and after reciting the payment of all the debts and legacies, except the legacies of 10,000*l.*, and 10,000*l.* in trust for the said Lady Saye and Sele, the said legacies were then raisable under the trusts therein mentioned and created for that purpose by sale of the entirety, or a sufficient part of the estates comprised in the said partition, but the parties interested had signified their desire that a sale should not take place, but that each undivided third part of the said estates, or a competent part thereof, should be charged with one third of the charges therein mentioned, and that Sir Culling Smith had paid 4666*l.* 13*s.* 4*d.*, and that the said John Walbancke Childers had paid 1166*l.* 13*s.* 4*d.* in part satisfaction of the respective third parts of the said legacies, it was witnessed, that the messuages, farms, lands, tenements, and hereditaments comprised in the schedule marked A, to the now-stating indenture annexed, were, with other hereditaments, conveyed to the use of the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling for the term of one thousand years from the day next before the day of the now-stating indenture. (and, subject to the said term, to the uses declared by the indenture of the 20th of September, 1826,) upon trust that they should, by mortgage, sale, or other disposition of all or any part of the said hereditaments, and out of the rents and profits thereof, raise the sum of 14,166*l.* 13*s.* 4*d.*, with interest at 5*l.* per cent. in full satisfaction, with the sums of 4666*l.* 13*s.* 4*d.*, and 1166*l.* 13*s.* 4*d.* paid to them the said trustees as aforesaid, of the

the 22d of November, 1823, the said Sampson Lord Eardley made another codicil to his said will, and thereby gave and bequeathed the sum of 10,000*l.* sterling to the said Sir Thomas William Blomefield, William Gosling, Samuel Compton Cox, and Thomas Metcalfe, upon trust to stand possessed of the same upon such and the same trusts as the said 16,700*l.*

On the 16th of June, 1824, the said Sampson Lord Eardley made another codicil, and thereby revoked the said legacy of 16,700*l.* 3*l.* per cent. consolidated annuities so given in trust for the said Maria Marow Eardley, Lady Saye and Sele.

The said Sampson Eardley Eardley died on the 21st of May, 1824, without issue, and in the lifetime of his father, and the said Sampson Lord Eardley died on the 25th of December, 1824, without revoking or altering his said will and codicils as to the said appointment of executors as aforesaid, or as to the said bequests of 10,000*l.*, and 10,000*l.* to the said Maria Marow Eardley, Lady Saye and Sele, and leaving the said Edward Ravenscroft, Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, William Gosling, and Maria Marow Eardley, Lady Saye and Sele, him surviving.

After the death of the said Sampson Lord Eardley, the said Edward Ravenscroft and Thomas Metcalfe became entitled to the said lands, tenements, and hereditaments, according to, and under, and by virtue of the said secondly-mentioned indenture of the 18th of May, 1814, upon trust as in the same indenture limited; and the said Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, and William Gosling duly proved the said will and codicils of the said Sampson Lord Eardley.

The personal estate of the said Sampson Lord Eardley was not sufficient for the payment of his debts and legacies without a part of the said sum of 50,000*l.*, that is to say, 43,687*l.* 8*s.* 5*d.*, being required in respect of three legacies, viz., 20,000*l.* to the said Lady Saye and Sele, 10,000*l.* to the said Dame Charlotte Smith, and 13,000*l.* to the said Selina Childers.

The said Samuel Compton Cox died on the 1st of January, 1827.

By virtue of common recoveries suffered in or as of Michaelmas term, 6 & 7 Geo. 4, the respective estates tail of William Thomas Twisleton Fiennes, the eldest son of the said Maria Marow Eardley, Lady Saye and Sele, of Culling Eardley Smith, the eldest son of the said Charlotte, wife of the said Sir Culling Smith, Bart., and of John Walbancke Childers, the eldest son of the said Selina, wife of the said John Childers, and the remainders and limitations over in the said several undivided thirds of the said manors and hereditaments of the said Sampson Lord Eardley, were barred. And by an indenture, dated the 11th of July, 1826, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and other necessary parties, it was agreed that a partition of the said manors and hereditaments of the said Sampson Lord Eardley in the said secondly-mentioned indenture of the 18th of May, 1814, comprised, should be carried into effect by and between the said three daughters of the said Sampson Lord Eardley.

The Attorney General v. Metcalfe & another.

On the 21st of July, 1826, the said partition of the said estates was duly carried into effect, and by an indenture bearing date the 20th of September, 1826, one undivided third part of the said manors and hereditaments of the said Sampson Lord Eardley by the said indenture of the 18th of May, 1814, limited to the use of the said Maria Marow Eardley, Lady Saye and Sele, for her life as aforesaid, was limited and settled to such uses as to the said Maria Marow Eardley, Lady Saye and Sele, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the said William Thomas Twisleton Fiennes, or the survivors of them, should jointly appoint. And by another indenture, bearing date the 6th of January, 1827, and made between the said Edward Ravenscroft and Thomas Metcalfe of the first part, the Right Hon. Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the Right Hon. Maria Marow Eardley, Baroness Saye and Sele, his wife, and the said William Thomas Twisleton Fiennes of the second part, the said Sir Culling Smith and Culling Eardley Smith of the third part, the said Selina Childers and John Walbancke Childers of the fourth part, Samuel Forster and John Cox of the fifth part, William Meyrick of the sixth part, the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling of the seventh part, and William Martin Forster of the eighth part, after reciting, as the facts were, that a partition of the said manors and hereditaments of the said Sampson Lord Eardley had been agreed upon and carried into effect, and that, by virtue of the said partition, certain manors and hereditaments in the schedule thereunto annexed mentioned had been allotted to the said Maria Marow Eardley, Lady Saye and Sele; and after reciting the payment of all the debts and legacies, except the legacies of 10,000*l.*, and 10,000*l.* in trust for the said Lady Saye and Sele, the said legacies were then raisable under the trusts therein mentioned and created for that purpose by sale of the entirety, or a sufficient part of the estates comprised in the said partition, but the parties interested had signified their desire that a sale should not take place, but that each undivided third part of the said estates, or a competent part thereof, should be charged with one third of the charges therein mentioned, and that Sir Culling Smith had paid 4666*l.* 13*s.* 4*d.*, and that the said John Walbancke Childers had paid 1166*l.* 13*s.* 4*d.* in part satisfaction of the respective third parts of the said legacies, it was witnessed, that the messuages, farms, lands, tenements, and hereditaments comprised in the schedule marked A, to the now-stating indenture annexed, were, with other hereditaments, conveyed to the use of the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling for the term of one thousand years from the day next before the day of the now-stating indenture. (and, subject to the said term, to the uses declared by the indenture of the 20th of September, 1826,) upon trust that they should, by mortgage, sale, or other disposition of all or any part of the said hereditaments, and out of the rents and profits thereof, raise the sum of 14,166*l.* 13*s.* 4*d.*, with interest at 5*l.* per cent. in full satisfaction, with the sums of 4666*l.* 13*s.* 4*d.*, and 1166*l.* 13*s.* 4*d.* paid to them the said trustees as aforesaid, of the

The Attorney General v. Metcalfe & another.

legacies amounting to 20,000*l.* bequeathed in trust for the said Maria Marow Eardley, Lady Saye and Sele, as aforesaid.

By a deed poll, dated the 6th of February, 1827, made by the said Maria Marow Eardley, Lady Saye and Sele, in order to enable her said husband to receive the two sums of 4666*l.* 13*s.* 4*d.* and 1166*l.* 13*s.* 4*d.*, making together 5833*l.* 6*s.* 8*d.*, and in exercise of the power for that purpose given to her by the said will and codicils of the said Lord Eardley, the said Maria Marow Eardley, Lady Saye and Sele, did appoint that the said sum of 5833*l.* 6*s.* 8*d.*, parcel of the said several sums of 10,000*l.* and 10,000*l.*, should be paid to her husband, and the residue as she should appoint, and in default of appointment it should be paid to her husband.

The said Samuel Compton Cox died on the 1st of January, 1827, and the said William Gosling died on the 27th of January, 1834, and the said Maria Marow Eardley, Lady Saye and Sele, died on the 6th of October, 1834, without further exercising the power of appointment in herself reserved as aforesaid, leaving her said husband, Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, her surviving.

After the death of Lady Saye and Sele, and before the decease of the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, by further payments, the said sum of 14,166*l.* 13*s.* 4*d.* became reduced to the sum of 11,462*l.* 5*s.* 3*d.*

By an indenture, bearing date the 12th of August, 1836, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, of the first part, and his son William Thomas Twisleton Fiennes, of the second part, the manors and hereditaments comprised in the said schedule marked A, to the above-stated indenture of the 6th of January, 1827, were appointed and conveyed by the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and William Thomas Twisleton Fiennes, subject to the said term of one thousand years, for securing 11,452*l.* 5*s.* 3*d.*, being the residue of the said several sums of 10,000*l.* and 10,000*l.* then remaining unpaid, to the use of them, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and William Thomas Twisleton Fiennes, and the survivor of them in fee.

On the 13th of November, 1844, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, died, whereupon his said son William Thomas Twisleton Fiennes became Lord Saye and Sele, and then became and was seized of the said last-mentioned manors and hereditaments in the said indenture of the 12th of August, 1836, comprised, and also became and was entitled as residuary legatee, under the will of his said father, to the residue of the said several sums of 10,000*l.* and 10,000*l.* then remaining raisable under the trusts of the said term of one thousand years, that is to say, 11,452*l.* 5*s.* 3*d.*

The said William Thomas Twisleton Fiennes, Lord Saye and Sele, was desirous that the money in question should not be actually raised out of the said estates so vested in him, but that the charge should be merged in the said estates, and that the said estates should be

The Attorney General v. Metcalfe & another.

exonerated from the said charge; and it was therefore agreed amongst all the parties, that such object should be effected by the deed next hereinafter stated, and that the said William Thomas Twisleton Fiennes, Lord Saye and Sele, should accept such merger of the said charge out of the term of one thousand years from the said Thomas Metcalfe and Sir Thomas William Blomefield, as a satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*

In pursuance of such agreement, and by an indenture bearing date the 10th of July, 1845, made between the said Thomas Metcalfe and Sir Thomas William Blomefield of the one part, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, of the other part, the said term by the said indenture of the 6th of January, 1827, granted, was surrendered and became merged in the inheritance, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, then accepted and received the said merger and the said execution of the said deed poll in full satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*, and, by means of the foregoing proceedings and of the said surrender, the residue of the said legacies of 10,000*l.* and 10,000*l.* became satisfied and discharged, according to the true intent and meaning of the said last will and testament and codicils of the said Sampson Lord Eardley, and of the said secondly-mentioned indenture of the 8th of May, 1814.

The said Maria Marow Eardley, Lady Saye and Sele, was a daughter of the said testator Sampson Lord Eardley.

The commissioners of inland revenue claim and demand from the said Thomas Metcalfe and Sir Thomas William Blomefield payment of 200*l.*, as the amount of duty payable in respect of the said legacies of 10,000*l.* and 10,000*l.* so satisfied as aforesaid; but the said Thomas Metcalfe and Sir Thomas William Blomefield refuse to pay the same or any part thereof.

The question for the opinion of the court was, whether any and what amount of legacy duty was payable under the above circumstances. If the court should be of opinion that legacy duty was payable, then judgment would be entered for the crown for such sum as should be so considered to be payable. If the court should be of a contrary opinion, then a *nolle prosequi* was to be entered.

Crompton, for the crown. The duty has been paid upon the 8547*l.* 14*s.* 9*d.*, and the question is as to the residue. Both the sums of 10,000*l.* are pecuniary legacies left by the will, and there is nothing in the statute to exempt them. They are legacies of personalty, and the accident that the estate was not sold does not affect the right of the crown to the duty.

[*Martin*, B. Is it not as if A. had an estate subject to a charge to B., and B. bequeathed the charge to A. ?]

Yes; and *The Attorney General v. Holford*, 1 Price, 426, decides, that where the party beneficially interested elects to take the estate in specie, the duty is still payable, just as if the estate had been sold. There is a satisfaction of the legacy within the meaning of the 36

Lowe v. Carpenter.

been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." The 1st section having provided a time of limitation for claims of common and profits *a prendre*, and the 3d for claims to light and air, the 4th enacts, that "each of the respective periods of years herein before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." We contend, that, when there has been a general user for a period exceeding the twenty or forty years exacted by the statute, the right is not lost by want of proof of its continuance for a year or two previous to the commencement of the suit.

[*Platt, B.* What then do you do with the 6th section, by which it is enacted, that "in the several cases mentioned in and provided for by this act no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim"? According to your argument, an enjoyment for eighteen years would support a user for twenty.]

No; the meaning of the statute is this: If you prove an enjoyment for less than the twenty or forty years, as the case may be, no presumption can be made; but if you prove acts of enjoyment extending over a period longer than twenty or forty years, &c., with a subsequent interruption, it is a question for the jury whether the right did not exist during the required time. Indeed, an opposite construction would lead to absurdity, for enjoyment during every moment of the prescribed time is impossible, and enjoyment must be coextensive with the wants of the party entitled to the right. *Flight v. Thomas*, 11 Ad. & El. 688, clearly shows that it is not necessary to prove an actual enjoyment during the whole time: it was there held, that the clause in the 4th section of this statute, that an interruption to be effectual must be acquiesced in for a year, is not limited to an interruption in the middle of the term of twenty or forty years, but is equally applicable to an interruption ending with the last of the series of years. In *Hall v. Swift*, 4 Bing. N. C. 381, Tindal, C. J., says, "The second objection is, that though the stream was proved to have flowed to the plaintiff's premises more than twenty years ago, yet as there was some interruption before the twenty years began to run, and the stream did not flow again in its former course till within nineteen years, there is a want of sufficient evidence to support the plaintiff's claim. But it would be very dangerous to hold that a

Lowe v. Carpenter.

party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment."

[Alderson, B. This shows the danger of putting in words — a thing which persons who prepare codes never understand. Those who drew this statute said they would get rid of fictions in cases like the present, and meant to do so; instead of which, they establish that nineteen years means twenty years.]

The case of *Parker v. Mitchell*, 11 Ad. & El. 788, will probably be relied on, and is certainly in point against the defendant; but its authority has been very much shaken by the more recent case of *Carr v. Foster*, 3 Q. B. 581, which seems in point to the present; and the language of Patteson, J., there is the more remarkable, as he was one of the judges who decided the former case. In the latter case it was held, that where proof is given of a right enjoyed at the time of the action brought, and for thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased, or was still substantially enjoyed; and that the inference to be drawn from the facts proved on this point is not a presumption within the meaning of the 6th section. As to the claim for judgment *non obstante veredicto*, the case of *Jones v. Price*, 3 Bing. N. C. 52, is an express authority that a plea under this statute is good without the word "next" before "the commencement of the suit."

Greaves, in support of the rule. The court is bound to look to the time covered by pleas like the present. Any antecedent time is irrelevant except in cases where it is doubtful whether the usage during a portion of the alleged time was a usage of right, in which case antecedent usage may be employed to explain it. But when, as here, a plea sets up an actual user and enjoyment for twenty or forty years before action brought, it is not supported by proof of a user coming down only to two years before that time. Proof of user is not indeed required for every day of the twenty years, or down to the very moment of bringing the action, but a substantial enjoyment must be shown from the *terminus a quo* to the *terminus ad quem*. It is absurd to call on a jury to presume that a man has enjoyed something during two years, when the evidence shows he has not enjoyed it, and from thence to make a second presumption that that enjoyment was a rightful one. Another reason why nothing short of actual user can satisfy the statute is, that the effect of user during the prescribed time is to give a party a right over another man's property, which, under the old law, might have been defeated by showing the origin of the usage or unity of possession. It should also be remembered that acts of user are things known to the party doing them, but of which the person against whom the right is claimed may be ignorant. One of the earliest cases on this statute was *Wright v. Williams*, Tyr. & G. 375, where the court, in delivering judgment, say, "We are of opinion that it is impossible to construe the act of Parliament (2 & 3 Will. 4,

Lowe v. Carpenter.

c. 71) as intending that the periods of years mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is, perhaps, rather apparent than real."

So in *Onley v. Gardiner*, 4 M. & W. 496, Parke, B., in delivering judgment, says, "The plea of actual enjoyment as of right of a way over the *locus in quo*, for twenty years next before the commencement of the suit, cannot be supported. We are all clearly of opinion that, in order to entitle the defendant to the benefit of the statutory plea, it must be an enjoyment of the easement *as such*, and as of right, for a *continuous period of twenty years next before the suit*, without such interruption as is defined in the act." In *Jones v. Price*, 3 Bing. N. C. 52, Tindal, C. J., says, "It seems to me that the 4th section of the stat. 2 & 3 Will. 4, c. 71, is nothing but an exposition of the proof required to establish the right. It is a mere question of evidence, and if the plaintiff joins in the issue now offered, the defendant will not be able to get out of the proof of the enjoyment of the right for thirty years next before the action." *Rickards v. Fry*, 7 Ad. & El. 698, is the converse of that case. [He relied on *Parker v. Mitchell* as being expressly in point, and cited the language of this court in *Ward v. Robins*, 15 M. & W. 237; and Alderson, B., referred to *Bailey v. Appleyard*, 8 Ad. & El. 161, 779.] The case of *Carr v. Foster* is distinguishable in several ways. First, there was evidence of usage from the *terminus a quo* to the *terminus ad quem*, the interruption being at an intermediate point of time. Secondly, the declaration was general, and might have been supported by proof of an immemorial right, independently of the statute. Thirdly, it was under a different section of the statute; and a right of common differs from a right of way in this, that it is used over different pieces of ground each year. Fourthly, the nonuser there was explained by showing that the owner of the right of common had no cattle during the time.

PARKE, B. This rule must be made absolute to enter the verdict for the plaintiff, with nominal damages, unless the defendant will pay the costs of the action and amend his pleadings by putting on the record a plea of a non-existing grant or prescription, if he thinks his evidence will support it. *Parker v. Mitchell* is, in fact, precisely in point. If there had been no decision on the subject, I should have been disposed to think that the stat. 2 & 3 Will. 4, c. 71, applied to cases where there has been a frequent exercise of the supposed right, once a year at least; for there is a clause in the statute, that "no act or other matter shall be deemed an interruption unless submitted to, or acquiesced in, for one year," which evidently points to that description of right which is exercised at least once a year, and, if interrupted for a year, is defeated. But *Parker v. Mitchell* says there must be some enjoyment of the right at the end as well as at the beginning of the period, which means, I think, some actual, not

Lowe v. Carpenter.

constructive, enjoyment during that period. There is certainly some difficulty in reconciling that decision with the subsequent decision in *Carr v. Foster*, though they may, perhaps, be reconciled by taking a distinction between enjoyment in the beginning, at the end, and in the middle of the term. If, however, it were necessary to decide that the two cases were irreconcilable, I think the more correct view would be, that no right could be obtained unless a user at least once a year during twenty, thirty, or forty years, as the case may be, were proved. No doubt there is great difficulty in carrying the statute into effect, and this shows how extremely difficult it is to alter the law so as to put an end to questions, the effect of the alteration often being to raise more questions than there were before. I think *Parker v. Mitchell* quite in point, and am by no means satisfied that it is wrong; and if so, this plea has not been proved, and the verdict must be entered for the plaintiff. No doubt the statute requires in words (as already explained in *Ward v. Robins*) that the period of time of enjoyment should be the whole period of twenty, thirty years, &c., and that it should continue up to the commencement of the suit. It is quite impossible to have actual enjoyment up to the very moment, or even within a day or a week of the time when the action was brought; and I think the true construction of the statute is, that some such act must have taken place within the year.

ALDERSON, B. I am of the same opinion. *Parker v. Mitchell* decides that enjoyment during the last year is material; *Bailey v. Appleyard* says the first year also is material; and *Carr v. Foster* seems to intimate that the intermediate ones are not so. Whether that distinction be sound or not, it certainly is a convenient one, for it is easy to prove enjoyment at the beginning or the end of the term — one or two witnesses would suffice for that; but it might require forty witnesses if such proof were required for every year between those limits.

PLATT, B. The statute says no right shall be gained except by enjoyment for the full periods specified in the several sections; and the 4th section distinctly points out the time from which the enjoyment is to run. In the present case, proof has not been given of such enjoyment; and, therefore, in accordance with the statute, and the decision in *Parker v. Mitchell*, which seems to me to be good law, this rule must be made absolute.

MARTIN, B. The question turns on the construction of this statute, which should be construed according to the plain grammatical meaning of the words. It says the right must arise from actual enjoyment during a certain number of years previous to the commencement of the suit; and the 4th section, as my brother Platt has observed, points out the time from which the calculation is to be made. How is it possible a man can be said to have enjoyed the thing, if the two are deficient? I think *Parker v. Mitchell* was

The Attorney General v. Metcalfe & another.

rightly decided, and the judgment in *Ward v. Robins* gives the true view of this matter.

Rule absolute to enter a verdict for the plaintiff, with nominal damages, unless the defendant within a fortnight gives notice to the plaintiff that he wishes to have a new trial on payment of costs, and then the defendant to be at liberty to add pleas of a right by prescription and non-existing grant. The costs to be paid on adding the pleas, and the defendant to take such notice of trial as the plaintiff can give.

THE ATTORNEY GENERAL v. METCALFE & another.¹

Hilary Term, January 24, 1851.

Legacy Duty — Discretion of Trustees to sell — Payment and Satisfaction of Legacy.

A. B. and C. his eldest son and heir apparent, by indenture dated the 9th of January, 1800, joined in conveying certain lands and hereditaments of A. B. to trustees, for a term of one hundred years, subject to certain trusts during the joint lives of A. B. and C., and with power of revocation, and with divers remainders over. By indenture of the 18th of May, 1814, reciting, *inter alia*, that A. B. was not possessed of sufficient personal estate to pay the debts he might owe and the legacies he might bequeath at his death, without the sale of his family pictures, &c., A. B. and C., after revoking the trusts of the deed of the 9th of January, 1800, appointed that the said lands, &c., should be held by certain trustees, in trust, to sell within six months after the death of A. B. so much as would raise a sum necessary for the payment of his debts and legacies, not exceeding 50,000*l.*, the same to be paid to his executors and applied in aid of his personal estate, (only certain portions of which personal estate were, by deed poll of the 18th of May, 1814, directed to be used prior to such 50,000*l.* being raised,) with a further trust to convey what should not be sold to C. for life, with certain remainders and limitations, and in default of such taking effect, with remainder, as to one undivided third to Lady S. and S., a daughter of A. B., for life with remainders to her sons, in tail; and as to the two other undivided thirds to D. and E., two other daughters of A. B., severally, with divers remainders over. By will, dated the 25th of June, 1814, and several subsequent codicils, A. B. appointed M. and others executors, and bequeathed to them two sums of 10,000*l.*, in trust, for such purposes as, notwithstanding her coverture, Lady S. and S. should appoint, and, in default of appointment, to her separate use. C. died in the lifetime of A. B., without issue, and A. B. himself died the 25th of December, 1824, without altering his said will and codicils, and leaving Lady S. and S., D. and E., respectively married and surviving. The personal estate of A. B. was insufficient for the payment of his debts and legacies without part of the 50,000*l.* being raised. By virtue of common recoveries, the respective estates tail of the sons of Lady S. and S., C. D. and E. were barred; and by deed, dated the 11th of July, 1826, between all necessary parties, it was agreed that a partition of the estates mentioned in the deed of the 18th of May, 1814, should take place.

The partition was accordingly effected by deed of the 21st of July, 1826, and by indenture of the 20th of September, 1826, one undivided third part was settled to such uses as Lady S. and S., her husband, and her eldest son, J. F., &c., or the survivor of them, should appoint. By deed of January, 1827, between Lady S. and S., D. and E., and their respective husbands and other necessary parties, after reciting that a partition had taken place, and certain lands, &c., were allotted to Lady S. and S.; that the debts and legacies had been paid, except the two sums of 10,000*l.*, which were raisable by sale of so much of the estate as might be required, but that the parties had agreed that, instead of a sale taking place, each undivided third part should be charged with one third of such legacies; that certain sums had been paid to the executors of A. B., in part satisfaction of two of the respective

¹ 20 Law J. Rep. (n. s.) Exch. 329.

The Attorney General v. Metcalfe & another.

third parts, it was witnessed that certain lands, specified in a schedule annexed to the deed marked A, were conveyed to the use of the executors of the will of A. B., for a term of one thousand years, and subject thereto to the uses declared by the indenture of the 20th of September, 1826, upon trust, to raise, by mortgage or sale, the sum of 14,166*l.* 13*s.* 4*d.*, being the amount left unpaid of the two legacies of 10,000*l.* to Lady S. and S. By deed, dated the 6th of February, 1827, Lady S. and S. appointed the sum of 5833*l.* 6*s.* 8*d.*, which had been received by the executors, as above mentioned, to her husband, and also the residue, in default of further appointment, and died on the 6th of October, 1834, without having made any such appointment, leaving her husband her surviving; but, prior to her death, the 14,166*l.* was, by further payments, reduced to 11,452*l.* 5*s.* 3*d.* By indenture, dated the 12th of August, 1836, made between Lord S. and S., and T. F., his eldest son, the lands, &c., comprised in the said schedule A were conveyed, subject to the said term of one thousand years, for securing the said sum of 11,452*l.* 5*s.* 3*d.*, to the use of the said Lord S. and S. and T. F., and the survivor of them. On the 13th of November, 1844, Lord S. and S. died; whereupon the said son, T. F., became seized of the lands, &c., comprised in the deed of the 12th of August, 1836, and was entitled, as residuary legatee under the will of his father, to the said residue of the two legacies of 10,000*l.* By deed of the 10th of July, 1845, made between the surviving executors of A. B. and T. F., (then become Lord S. and S.,) the said term created by the deed of the 6th of January, 1827, was surrendered and became merged in the inheritance, and Lord T. F. accepted the said merger in full satisfaction and discharge of the legacies of 10,000*l.* and 10,000*l.*, and the said residue was thereby satisfied and discharged:—

Held, that the legacy duty was payable by the executors of A. B. upon the whole 20,000*l.*, as so much of the 50,000*l.* as was required was personalty, and the transaction by which the term was merged amounted to a payment of the residue of the legacies.

THIS was an information for legacy duties claimed from the executors of the will of the late Sampson Lord Eardley, in respect of legacies given to his daughter, the late Lady Saye and Sele. The defendant pleaded *nil debet*, and after issue joined, by consent of the parties, the facts were stated in a special case for the opinion of the court.

Case. By deed of lease and release, dated the 9th of January, 1800, and made between Sampson Lord Eardley and Sampson Eardley Eardley, the eldest son and heir apparent of the said Sampson Lord Eardley, of the first part, John Wilmot and Thomas Rivett, Esqs., of the second part, the said Sir Thomas Blomefield of the third part, and Eardley Wilmot and Edward Ravenscroft, Esqs., of the fourth part, certain lands, tenements, and hereditaments particularly mentioned and described in the said indenture were released and conveyed by the said Sampson Lord Eardley and Sampson Eardley Eardley, amongst other things, subject to a power of revocation to the use of the said Sir Thomas William Blomefield for a term of one hundred years, for securing an annual rent charge of 2000*l.* to the said Sampson Eardley Eardley during the joint lives of himself and the said Sampson Lord Eardley, subject thereto to the use of the said Sampson Eardley Eardley and his sons in tail male, with divers remainders over.

By indenture, dated the 18th of May, 1814, and made between the said Sampson Lord Eardley of the first part, the said Sampson Eardley Eardley of the second part, the said John Wilmot (by the name of John Eardley Wilmot) and Thomas Rivett of the third part, and the said Edward Ravenscroft and Thomas Metcalfe of the fourth part, reciting, among other things, that the said Sampson Lord Eardley was not possessed of personal estate sufficient, in the event of his death, to discharge all the debts he might probably owe, and

The Attorney General v. Metcalfe & another.

such legacies as he might probably bequeath, without resorting to a sale of his family and other pictures, plate, and other articles of a similar nature, and that, therefore, the said Sampson Eardley Eardley had agreed, for the accommodation of the said Sampson Lord Eardley, to join with him in charging the said manors and other hereditaments which were then legally or equitably subject to the limitations contained in the said first-mentioned indenture, with the sum of 50,000*l.* sterling to be raised after the death of the said Sampson Lord Eardley, and applied in augmentation of his personal estate in manner in the said secondly-mentioned indenture mentioned, for effecting which purposes they had agreed to exercise the said power of revocation, and new appointment reserved to them by the said first-mentioned indenture; and that it had been agreed that the said Sampson Lord Eardley should assign to trustees the paintings, statues, bronzes, drawings, engravings, plate, china, and furniture in Belvidere House and Grosvenor Street House upon the trusts of the said secondly-mentioned indenture declared, they, the said Sampson Lord Eardley and Sampson Eardley Eardley, did revoke the trusts and powers in the indenture of the 9th of January, 1800, mentioned, and which were then subsisting and capable of taking effect, and did direct, limit, and appoint that all the said lands, tenements, and hereditaments should be and remain unto and to the use of the said Edward Ravenscroft and Thomas Metcalfe, their heirs and assigns, upon certain trusts during the life of the said Sampson Lord Eardley, and after his decease upon trust within six calendar months, to be computed from the day of his decease, by sale (and not by mortgage) of any competent part of the said manors and other hereditaments, to raise such sum, not exceeding 50,000*l.*, as should be necessary to make good the deficiency of the personal estate of the said Sampson Lord Eardley in payment of his debts and legacies, and in aid of the same, and should pay the sum so raised to his executors or administrators, to the intent that the same might be applied by them in aid of his personal estate for the purposes hereinbefore mentioned, upon trust to convey such of the said manors and hereditaments as should not be sold to the use of the said Sampson Eardley Eardley for life, with remainder to the use of the first and other sons of the said Sampson Eardley Eardley in tail male, with remainder, after divers limitations which did not take effect, as to one undivided third part of the said manors and hereditaments, to Maria Marow Eardley, Lady Saye and Sele, one of the daughters of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to one other undivided third part to Charlotte, wife of Sir Culling Smith, Bart., since deceased, another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to the other undivided third part, to Selina, wife of John Childers, Esq., another daughter of the said Sampson Lord Eardley, for her life, with remainder to successively in tail, with remainders over. The said Sampson Lord Eardley, with the privity of the said Sampson Eardley then granted and assigned unto the said John Eardley

The Attorney General v. Metcalfe & another.

Wilmot and Thomas Rivett, their executors, administrators, and assigns, all those the said paintings, statues, bronzes, drawings, engravings, plate, china, and furniture, upon certain trusts therein specified.

On the 18th of May, 1814, a deed poll was made by the said Sampson Lord Eardley and Sampson Eardley Eardley, and indorsed on the said last-mentioned indenture, by which he appointed, that if the money and arrears of debts due to the said Sampson Lord Eardley at his decease, ground rents arising from houses or lands in London or Middlesex, shares of public funds and securities for money of which he should be possessed at his decease, should be insufficient for the payment of his debts and legacies, then neither any other part of his personal estate nor his real estate should be resorted to for making good the deficiency, until the whole of the said sum of 50,000*l.* should have been applied and exhausted in making good such deficiency. And on the 16th of December, 1823, by another deed poll, the said Sampson Lord Eardley and Sampson Eardley Eardley directed and appointed that a written declaration, signed by the executors or administrators of the said Sampson Lord Eardley, that the said sum of 50,000*l.*, or any portion of it, was, at the time of the making of the said declaration, wanted for the purpose for which the said sum of 50,000*l.* was made raisable as aforesaid, should be sufficient and conclusive evidence that the sum mentioned in the said declaration was so wanted for those purposes, and that the receipt of such executors or administrators should be a sufficient discharge for the same.

The said Sampson Lord Eardley, by his will, dated the 25th of June, 1814, amongst other things, gave and bequeathed unto the said John Eardley Wilmot, Samuel Compton Cox, Esq., since deceased, Francis Gosling, Esq., since deceased, and the said Thomas Metcalfe, their executors, administrators, and assigns, such sum of money as, within one month after the death of the said Sampson Lord Eardley, would purchase into their names the sum of 16,700*l.* bank 3*l.* per cent. annuities. And the said Sampson Lord Eardley thereby also gave to them, the said John Eardley Wilmot, Samuel Compton Cox, Esq., Francis Gosling, and Thomas Metcalfe, the sum of 10,000*l.* sterling, upon trust to transfer the said 16,700*l.* bank 3*l.* per cent. annuities when so purchased, and pay the said sum of 10,000*l.* to such persons and for such purposes only as, notwithstanding her coverture, the said Maria Marow Eardley, Lady Saye and Sele, the daughter of the said Sampson Lord Eardley, should by any deed appoint, and in default of appointment to her separate use.

The said Sampson Lord Eardley appointed the said John Eardley Wilmot, Samuel Compton Cox, Francis Gosling, and Thomas Metcalfe executors of his said last will.

On the 21st of December, A. D. 1820, the said Sampson Lord Eardley made a codicil to his said will, and thereby appointed the said Sir Thomas William Blomefield and William Gosling executors of his said last will and testament, instead of the said John Eardley Wilmot and Francis Gosling, who had before then died. And, on

The Attorney General v. Metcalfe & another.

such legacies as he might probably bequeath, without resorting to a sale of his family and other pictures, plate, and other articles of a similar nature, and that, therefore, the said Sampson Eardley Eardley had agreed, for the accommodation of the said Sampson Lord Eardley, to join with him in charging the said manors and other hereditaments which were then legally or equitably subject to the limitations contained in the said first-mentioned indenture, with the sum of 50,000*l.* sterling to be raised after the death of the said Sampson Lord Eardley, and applied in augmentation of his personal estate in manner in the said secondly-mentioned indenture mentioned, for effecting which purposes they had agreed to exercise the said power of revocation, and new appointment reserved to them by the said first-mentioned indenture; and that it had been agreed that the said Sampson Lord Eardley should assign to trustees the paintings, statues, bronzes, drawings, engravings, plate, china, and furniture in Belvidere House and Grosvenor Street House upon the trusts of the said secondly-mentioned indenture declared, they, the said Sampson Lord Eardley and Sampson Eardley Eardley, did revoke the trusts and powers in the indenture of the 9th of January, 1800, mentioned, and which were then subsisting and capable of taking effect, and did direct, limit, and appoint that all the said lands, tenements, and hereditaments should be and remain unto and to the use of the said Edward Ravenscroft and Thomas Metcalfe, their heirs and assigns, upon certain trusts during the life of the said Sampson Lord Eardley, and after his decease upon trust within six calendar months, to be computed from the day of his decease, by sale (and not by mortgage) of any competent part of the said manors and other hereditaments, to raise such sum, not exceeding 50,000*l.*, as should be necessary to make good the deficiency of the personal estate of the said Sampson Lord Eardley in payment of his debts and legacies, and in aid of the same, and should pay the sum so raised to his executors or administrators, to the intent that the same might be applied by them in aid of his personal estate for the purposes hereinbefore mentioned, upon trust to convey such of the said manors and hereditaments as should not be sold to the use of the said Sampson Eardley Eardley for life, with remainder to the use of the first and other sons of the said Sampson Eardley Eardley in tail male, with remainder, after divers limitations which did not take effect, as to one undivided third part of the said manors and hereditaments, to Maria Marow Eardley, Lady Saye and Sele, one of the daughters of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to one other undivided third part to Charlotte, wife of Sir Culling Smith, Bart., since deceased, another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over; and as to the other undivided third part, to Selina, wife of John Childers, Esq., another daughter of the said Sampson Lord Eardley, for her life, with remainder to her sons successively in tail, with remainders over. The said Sampson Lord Eardley, with the privity of the said Sampson Eardley Eardley, then granted and assigned unto the said John Eardley

The Attorney General v. Metcalfe & another.

Wilmot and Thomas Rivett, their executors, administrators, and assigns, all those the said paintings, statues, bronzes, drawings, engravings, plate, china, and furniture, upon certain trusts therein specified.

On the 18th of May, 1814, a deed poll was made by the said Sampson Lord Eardley and Sampson Eardley Eardley, and indorsed on the said last-mentioned indenture, by which he appointed, that if the money and arrears of debts due to the said Sampson Lord Eardley at his decease, ground rents arising from houses or lands in London or Middlesex, shares of public funds and securities for money of which he should be possessed at his decease, should be insufficient for the payment of his debts and legacies, then neither any other part of his personal estate nor his real estate should be resorted to for making good the deficiency, until the whole of the said sum of 50,000*l.* should have been applied and exhausted in making good such deficiency. And on the 16th of December, 1823, by another deed poll, the said Sampson Lord Eardley and Sampson Eardley Eardley directed and appointed that a written declaration, signed by the executors or administrators of the said Sampson Lord Eardley, that the said sum of 50,000*l.*, or any portion of it, was, at the time of the making of the said declaration, wanted for the purpose for which the said sum of 50,000*l.* was made raisable as aforesaid, should be sufficient and conclusive evidence that the sum mentioned in the said declaration was so wanted for those purposes, and that the receipt of such executors or administrators should be a sufficient discharge for the same.

The said Sampson Lord Eardley, by his will, dated the 25th of June, 1814, amongst other things, gave and bequeathed unto the said John Eardley Wilmot, Samuel Compton Cox, Esq., since deceased, Francis Gosling, Esq., since deceased, and the said Thomas Metcalfe, their executors, administrators, and assigns, such sum of money as, within one month after the death of the said Sampson Lord Eardley, would purchase into their names the sum of 16,700*l.* bank 3*l.* per cent. annuities. And the said Sampson Lord Eardley thereby also gave to them, the said John Eardley Wilmot, Samuel Compton Cox, Esq., Francis Gosling, and Thomas Metcalfe, the sum of 10,000*l.* sterling, upon trust to transfer the said 16,700*l.* bank 3*l.* per cent. annuities when so purchased, and pay the said sum of 10,000*l.* to such persons and for such purposes only as, notwithstanding her coverture, the said Maria Marow Eardley, Lady Saye and Sele, the daughter of the said Sampson Lord Eardley, should by any deed appoint, and in default of appointment to her separate use.

The said Sampson Lord Eardley appointed the said John Eardley Wilmot, Samuel Compton Cox, Francis Gosling, and Thomas Metcalfe executors of his said last will.

On the 21st of December, A. D. 1820, the said Sampson Lord Eardley made a codicil to his said will, and thereby appointed the said Sir Thomas William Blomefield and William Gosling executors of his said last will and testament, instead of the said John Eardley Wilmot and Francis Gosling, who had before then died. And, on

The Attorney General v. Metcalfe & another.

the 22d of November, 1823, the said Sampson Lord Eardley made another codicil to his said will, and thereby gave and bequeathed the sum of 10,000*l.* sterling to the said Sir Thomas William Blomefield, William Gosling, Samuel Compton Cox, and Thomas Metcalfe, upon trust to stand possessed of the same upon such and the same trusts as the said 16,700*l.*

On the 16th of June, 1824, the said Sampson Lord Eardley made another codicil, and thereby revoked the said legacy of 16,700*l.* 3*l.* per cent. consolidated annuities so given in trust for the said Maria Marow Eardley, Lady Saye and Sele.

The said Sampson Eardley Eardley died on the 21st of May, 1824, without issue, and in the lifetime of his father, and the said Sampson Lord Eardley died on the 25th of December, 1824, without revoking or altering his said will and codicils as to the said appointment of executors as aforesaid, or as to the said bequests of 10,000*l.*, and 10,000*l.* to the said Maria Marow Eardley, Lady Saye and Sele, and leaving the said Edward Ravenscroft, Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, William Gosling, and Maria Marow Eardley, Lady Saye and Sele, him surviving.

After the death of the said Sampson Lord Eardley, the said Edward Ravenscroft and Thomas Metcalfe became entitled to the said lands, tenements, and hereditaments, according to, and under, and by virtue of the said secondly-mentioned indenture of the 18th of May, 1814, upon trust as in the same indenture limited; and the said Thomas Metcalfe, Samuel Compton Cox, Sir Thomas William Blomefield, and William Gosling duly proved the said will and codicils of the said Sampson Lord Eardley.

The personal estate of the said Sampson Lord Eardley was not sufficient for the payment of his debts and legacies without a part of the said sum of 50,000*l.*, that is to say, 43,687*l.* 8*s.* 5*d.*, being required in respect of three legacies, viz., 20,000*l.* to the said Lady Saye and Sele, 10,000*l.* to the said Dame Charlotte Smith, and 13,000*l.* to the said Selina Childers.

The said Samuel Compton Cox died on the 1st of January, 1827.

By virtue of common recoveries suffered in or as of Michaelmas term, 6 & 7 Geo. 4, the respective estates tail of William Thomas Twisleton Fiennes, the eldest son of the said Maria Marow Eardley, Lady Saye and Sele, of Culling Eardley Smith, the eldest son of the said Charlotte, wife of the said Sir Culling Smith, Bart., and of John Walbancke Childers, the eldest son of the said Selina, wife of the said John Childers, and the remainders and limitations over in the said several undivided thirds of the said manors and hereditaments of the said Sampson Lord Eardley, were barred. And by an indenture, dated the 11th of July, 1826, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and other necessary parties, it was agreed that a partition of the said manors and hereditaments of the said Sampson Lord Eardley in the said secondly-mentioned indenture of the 18th of May, 1814, comprised, should be carried into effect by and between the said three daughters of the said Sampson Lord Eardley.

The Attorney General v. Metcalfe & another.

On the 21st of July, 1826, the said partition of the said estates was duly carried into effect, and by an indenture bearing date the 20th of September, 1826, one undivided third part of the said manors and hereditaments of the said Sampson Lord Eardley by the said indenture of the 18th of May, 1814, limited to the use of the said Maria Marow Eardley, Lady Saye and Sele, for her life as aforesaid, was limited and settled to such uses as to the said Maria Marow Eardley, Lady Saye and Sele, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the said William Thomas Twisleton Fiennes, or the survivors of them, should jointly appoint. And by another indenture, bearing date the 6th of January, 1827, and made between the said Edward Ravenscroft and Thomas Metcalfe of the first part, the Right Hon. Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and the Right Hon. Maria Marow Eardley, Baroness Saye and Sele, his wife, and the said William Thomas Twisleton Fiennes of the second part, the said Sir Culling Smith and Culling Eardley Smith of the third part, the said Selina Childers and John Walbancke Childers of the fourth part, Samuel Forster and John Cox of the fifth part, William Meyrick of the sixth part, the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling of the seventh part, and William Martin Forster of the eighth part, after reciting, as the facts were, that a partition of the said manors and hereditaments of the said Sampson Lord Eardley had been agreed upon and carried into effect, and that, by virtue of the said partition, certain manors and hereditaments in the schedule thereunto annexed mentioned had been allotted to the said Maria Marow Eardley, Lady Saye and Sele; and after reciting the payment of all the debts and legacies, except the legacies of 10,000*l.*, and 10,000*l.* in trust for the said Lady Saye and Sele, the said legacies were then raisable under the trusts therein mentioned and created for that purpose by sale of the entirety, or a sufficient part of the estates comprised in the said partition, but the parties interested had signified their desire that a sale should not take place, but that each undivided third part of the said estates, or a competent part thereof, should be charged with one third of the charges therein mentioned, and that Sir Culling Smith had paid 4666*l.* 13*s.* 4*d.*, and that the said John Walbancke Childers had paid 1166*l.* 13*s.* 4*d.* in part satisfaction of the respective third parts of the said legacies, it was witnessed, that the messuages, farms, lands, tenements, and hereditaments comprised in the schedule marked A, to the now-stating indenture annexed, were, with other hereditaments, conveyed to the use of the said Thomas Metcalfe, Sir Thomas William Blomefield, and William Gosling for the term of one thousand years from the day next before the day of the now-stating indenture, (and, subject to the said term, to the uses declared by the indenture of the 20th of September, 1826,) upon trust that they should, by mortgage, sale, or other disposition of all or any part of the said hereditaments, and out of the rents and profits thereof, raise the sum of 14,166*l.* 13*s.* 4*d.*, with interest at 5*l.* per cent. in full satisfaction, with the sums of 4666*l.* 13*s.* 4*d.*, and 1166*l.* 13*s.* 4*d.* paid to them the said trustees as aforesaid, of the

legacies amounting to 20,000*l.* bequeathed in trust for the said Maria Marow Eardley, Lady Saye and Sele, as aforesaid.

By a deed poll, dated the 6th of February, 1827, made by the said Maria Marow Eardley, Lady Saye and Sele, in order to enable her said husband to receive the two sums of 4666*l.* 13*s.* 4*d.* and 1166*l.* 13*s.* 4*d.*, making together 5833*l.* 6*s.* 8*d.*, and in exercise of the power for that purpose given to her by the said will and codicils of the said Lord Eardley, the said Maria Marow Eardley, Lady Saye and Sele, did appoint that the said sum of 5833*l.* 6*s.* 8*d.*, parcel of the said several sums of 10,000*l.* and 10,000*l.*, should be paid to her husband, and the residue as she should appoint, and in default of appointment it should be paid to her husband.

The said Samuel Compton Cox died on the 1st of January, 1827, and the said William Gosling died on the 27th of January, 1834, and the said Maria Marow Eardley, Lady Saye and Sele, died on the 6th of October, 1834, without further exercising the power of appointment in herself reserved as aforesaid, leaving her said husband, Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, her surviving.

After the death of Lady Saye and Sele, and before the decease of the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, by further payments, the said sum of 14,166*l.* 13*s.* 4*d.* became reduced to the sum of 11,462*l.* 5*s.* 3*d.*

By an indenture, bearing date the 12th of August, 1836, and made between the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, of the first part, and his son William Thomas Twisleton Fiennes, of the second part, the manors and hereditaments comprised in the said schedule marked A, to the above-stated indenture of the 6th of January, 1827, were appointed and conveyed by the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and William Thomas Twisleton Fiennes, subject to the said term of one thousand years, for securing 11,452*l.* 5*s.* 3*d.*, being the residue of the said several sums of 10,000*l.* and 10,000*l.* then remaining unpaid, to the use of them, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, and William Thomas Twisleton Fiennes, and the survivor of them in fee.

On the 13th of November, 1844, the said Gregory William Eardley Twisleton Fiennes, Lord Saye and Sele, died, whereupon his said son William Thomas Twisleton Fiennes became Lord Saye and Sele, and then became and was seized of the said last-mentioned manors and hereditaments in the said indenture of the 12th of August, 1836, comprised, and also became and was entitled as residuary legatee, under the will of his said father, to the residue of the said several sums of 10,000*l.* and 10,000*l.* then remaining raisable under the trusts of the said term of one thousand years, that is to say, 11,452*l.* 5*s.* 3*d.*

The said William Thomas Twisleton Fiennes, Lord Saye and Sele, was desirous that the money in question should not be actually raised out of the said estates so vested in him, but that the charge should be merged in the said estates, and that the said estates should be

The Attorney General v. Metcalfe & another.

exonerated from the said charge; and it was therefore agreed amongst all the parties, that such object should be effected by the deed next hereinafter stated, and that the said William Thomas Twisleton Fiennes, Lord Saye and Sele, should accept such merger of the said charge out of the term of one thousand years from the said Thomas Metcalfe and Sir Thomas William Blomefield, as a satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*

In pursuance of such agreement, and by an indenture bearing date the 10th of July, 1845, made between the said Thomas Metcalfe and Sir Thomas William Blomefield of the one part, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, of the other part, the said term by the said indenture of the 6th of January, 1827, granted, was surrendered and became merged in the inheritance, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, then accepted and received the said merger and the said execution of the said deed poll in full satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*, and, by means of the foregoing proceedings and of the said surrender, the residue of the said legacies of 10,000*l.* and 10,000*l.* became satisfied and discharged, according to the true intent and meaning of the said last will and testament and codicils of the said Sampson Lord Eardley, and of the said secondly-mentioned indenture of the 8th of May, 1814.

The said Maria Marow Eardley, Lady Saye and Sele, was a daughter of the said testator Sampson Lord Eardley.

The commissioners of inland revenue claim and demand from the said Thomas Metcalfe and Sir Thomas William Blomefield payment of 200*l.*, as the amount of duty payable in respect of the said legacies of 10,000*l.* and 10,000*l.* so satisfied as aforesaid; but the said Thomas Metcalfe and Sir Thomas William Blomefield refuse to pay the same or any part thereof.

The question for the opinion of the court was, whether any and what amount of legacy duty was payable under the above circumstances. If the court should be of opinion that legacy duty was payable, then judgment would be entered for the crown for such sum as should be so considered to be payable. If the court should be of a contrary opinion, then a *nolle prosequi* was to be entered.

Crompton, for the crown. The duty has been paid upon the 8547*l.* 14*s.* 9*d.*, and the question is as to the residue. Both the sums of 10,000*l.* are pecuniary legacies left by the will, and there is nothing in the statute to exempt them. They are legacies of personalty, and the accident that the estate was not sold does not affect the right of the crown to the duty.

[*Martin*, B. Is it not as if A. had an estate subject to a charge to B., and B. bequeathed the charge to A. ?]

Yes; and *The Attorney General v. Holford*, 1 Price, 426, decides, that where the party beneficially interested elects to take the estate in specie, the duty is still payable, just as if the estate had been sold. There is a satisfaction of the legacy within the meaning of the 36

111-117 8111-100-322 1551

W
L
or
exe
10,0
leav
Com
and M

After
ward l
lands, 1
virtue o
1814, up
Thomas
Blomfi
codicils

The pe.
sufficient fo
of the said
required in
Saye and Se
to th e said S.
The said

to the said
The said
By virtue of
term, 6 & 7 Ge
Twisleton Fie
Lady Sme and
said Chas to
Walby Ho
said J. su
said E
of the re
ture. E
ory co
the the
a
i
u
ra

The Attorney General v. Metcalfe & another.

exonerated from the said charge; and it was therefore agreed amongst all the parties, that such object should be effected by the deed next hereinafter stated, and that the said William Thomas Twisleton Fiennes, Lord Saye and Sele, should accept such merger of the said charge out of the term of one thousand years from the said Thomas Metcalfe and Sir Thomas William Blomefield, as a satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*

In pursuance of such agreement, and by an indenture bearing date the 10th of July, 1845, made between the said Thomas Metcalfe and Sir Thomas William Blomefield of the one part, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, of the other part, the said term by the said indenture of the 6th of January, 1827, granted, was surrendered and became merged in the inheritance, and the said William Thomas Eardley Twisleton Fiennes, Lord Saye and Sele, then accepted and received the said merger and the said portion of the said deed poll in full satisfaction and discharge of the said remainder of the said legacies of 10,000*l.* and 10,000*l.*, and, by means of the foregoing proceedings and of the said surrender, the residue of the said legacies of 10,000*l.* and 10,000*l.* became satisfied and discharged, according to the true intent and meaning of the last will and testament and codicils of the said Sampson Lord Eardley, and of the said secondly-mentioned indenture of the 8th of July, 1814.

The said Maria Marow Eardley, Lady Saye and Sele, was a daughter of the said testator Sampson Lord Eardley.

The commissioners of inland revenue claim and demand from the said Thomas Metcalfe and Sir Thomas William Blomefield payable 200*l.*, as the amount of duty payable in respect of the said legacies of 10,000*l.* and 10,000*l.* so satisfied as aforesaid; but the said Thomas Metcalfe and Sir Thomas William Blomefield refuse to pay the same or any part thereof.

The question for the opinion of the court was, whether any and what amount of legacy duty was payable under the above circumstances. If the court should be of opinion that legacy duty was payable, then judgment would be entered for the crown for such sum as should be so considered to be payable. If the court should be of opinion, then a *nolle prosequi* was to be entered.

The court, for the crown. The duty has been paid upon the 8547*l.* and the question is as to the residue. Both the sums of the pecuniary legacies left by the will, and there is nothing to exempt them. They are legacies of personalty, and it is not that the estate was not sold does not affect the right of the crown to the duty.

B. Is it not as if A. had an estate subject to a charge to bequeathed the charge to A.?

The *Attorney General v. Holford*, 1 Price, 426, decides, that the party beneficially interested elects to take the estate in duty is still payable, just as if the estate had been sold. The satisfaction of the legacy within the meaning of the 36

dations into court, instead of defending the action. Lord Abinger's judgment is strong in favor of the defendant, and he expressly says the case of *Neale v. Wyllie* is not law, and was decided on a mistaken principle. In *Logan v. Hall*, A., being lessee of a messuage under the corporation of London, demised it, in 1829, to B., C., and D. for twenty-one years; the lessees covenanted to repair and to insure "in the sum of 2500*l.*, at the least, in the Protector Fire Insurance Office, or in such other respectable insurance office in London or Westminster, as B., C., and D., (the lessors,) their executors, &c., should think fit;" with a proviso for reëntry for breach of any of the covenants. The messuage being out of repair and uninsured, the executors of A., in 1843, brought ejectment, and recovered possession. It was held, that C. was not entitled to recover against E. and F. the value of his reversionary interest, the loss thereof not being the result of their breaches of covenant, but of the breaches of covenant by C., to which covenants they were no parties. And, also, that the execution by the defendants of the indenture of under lease, and payment of rent thereunder to C., were sufficient evidence for the jury that C. was solely entitled to the reversion expectant upon the determination of the under lease.

[*Martin*, B. Surely it was a more reasonable course for Goodered to suffer judgment by default than to pay money into court and go to trial on the question of the sufficiency of the sum paid in, in which case surveyors, each giving contradictory evidence, would have been called on each side at a great expense to the parties.]

[*Alderson*, B. It seems to me that the suffering judgment by default is the more reasonable course of proceeding.]

Secondly, the action was brought prematurely, for it was commenced before judgment had been signed in the action of *Goodered v. Smith*, and, consequently, before the debt and costs were incurred.

[*Martin*, B. The fact of judgment having been signed against the plaintiff after the commencement of the present action is immaterial.]

At the time of the commencement of the present action, the present defendant was not liable to the costs of *Goodered v. Smith*. *Collinge v. Heywood* is in favor of the defendant.

POLLOCK, C. B. The verdict in this case must be reduced to the sum of 362*l.* 16*s.* 6*d.*, being compounded of 94*l.* 10*s.* for rent, 165*l.* 10*s.* for repairs, and 102*l.* 16*s.* 6*d.* for the costs of the action of *Bridge v. Goodered*. These latter costs may be recovered as being proper under the circumstances for the purpose of ascertaining the liability, but all costs subsequently incurred by the plaintiff are superfluous, and cannot be recovered. This is in accordance with the late decisions on the subject. In former times, very wild notions prevailed respecting the contract of indemnity; but those notions are now exploded, and it is held that, on a covenant of indemnity, a party may recover all those charges which necessarily and reasonably arise out of the circumstances under which the party became responsible. The case of *Neale v. Wyllie* was much considered in *Walker v. Hatton*,

Smith v. Howell.

and Lord Abinger there says, that *Neale v. Wyllie* is not law, and cannot be supported; and then he proceeds to lay down a maxim which has often been repeated, and cannot be too much held in remembrance by all judges, that "making distinctions which have no solid foundation only tends to keep up litigation." On these grounds, it is clear that, upon a contract of indemnity, the party is entitled to recover those costs only which have been fairly and reasonably incurred. If, indeed, a party being entitled to an indemnity places himself in the hands of the person who is to indemnify him, and says, "I will take any course you may point out," and the party will not point out any course, or advise him as to what is to be done, such party would be responsible for all proper proceedings taken to ascertain the amount of injury sustained. That, however, is not the case here. The amount was ascertained at the time when the action was brought against the plaintiff. That amount, so ascertained, the plaintiff ought to have paid without incurring further litigation. That course, however, he did not think proper to pursue, but incurred further costs, and those costs the defendant is not liable to pay to the plaintiff. The defendant is liable to the extent of his indemnity at the time when the amount was ascertained.

ALDERSON, B. I agree with the lord chief baron. The question as to the rent is concluded by the case of *Warwick v. Richardson*. The party who is liable for the rent ought to ascertain the amount and pay it. The same principle applies to the repairs, although in that case it is more difficult to ascertain the amount. Then, how is that amount to be ascertained? I answer, By a judgment by default, as was the case here. But then it is said that Goodered might have paid money into court. Undoubtedly he might have done so, and then the transaction would in effect have been that the parties would have been laying a wager as to the sufficiency of the sum paid in. If that course had been pursued, a great amount of litigation would have been raised. The parties, therefore, apply to some tribunal to have the amount settled. It is, in fact, the same as if Smith had been informed by Goodered that Bridge had brought an action against him, and had desired Goodered to allow judgment to go by default. *Walker v. Hatton* is in point. But then it is said, on the authority of *Collinge v. Heywood*, that the costs in this case have not been paid by the plaintiff, and that a mere liability on the part of the plaintiff to pay is not sufficient. Here, however, an action has been brought by Goodered against the plaintiff, and by that action the plaintiff is damnified, for by that action he is made liable to pay the amount.

PLATT, B. I am of the same opinion. The plaintiff is entitled to recover in respect of the rent, the repairs, and the costs of the action against Goodered. The time for the performance of the covenant had certainly arrived, for the words of the covenant of the defendant were, that there was to be a payment of all costs, damages, and expenses which might be incurred. It is, therefore, a covenant to

Foster, Executor of Clark, v. Dawber.

indemnify when a demand is actually made. The plaintiff is entitled to be indemnified, although the time had not arrived for the payment of the amount of the judgment. He was, however, bound to indemnify, and his obligation begins as soon as the costs have been incurred, and the amount of the rent and repairs are duly ascertained.

MARTIN, B. I am of the same opinion. I think the defendant is clearly responsible, upon the authority of *Warwick v. Richardson*, for the rent and the repairs, and the defendant became responsible for the costs of the action of *Bridge v. Goodered* as soon as the liability to costs was incurred by the plaintiff. But the defendant is not liable to pay the costs incurred by the plaintiff in defending himself in the action by Goodered.

Rule absolute to reduce the verdict accordingly.

FOSTER, Executor of CLARK, v. DAWBER.¹

Trinity Vacation, June 28 and 30, 1851.

Promissory Note — Payment, Evidence of — Discharge, Evidence of — Bill of Exchange, Discharge from, by Parol — Statute of Limitations — Acknowledgment — Promise.

ASSUMPSIT. First count on a promissory note of the defendant for 500*l.*, dated the 7th of December, 1845; second count on a similar note, dated the 20th of January, 1846, both payable on demand, to J. Clark, the testator; third count, money lent; fourth count, account stated.

Pleas — To the first and second counts, first, payment; second, that after the making of the notes, and before demand of the principal or interest, and before any breach of the promises, J. Clark exonerated and discharged the defendant from payment of the notes; third, that after making the notes it was agreed, between J. Clark and the defendant, that the latter should purchase, with his own money, a piece of paper marked with a 10*s.* receipt stamp, and should fill up and write on it thus: "Hull, February 16, 1846. Received of R. Dawber (the defendant) the sum of 1080*l.*, being the principal and interest on two notes, dated December, 1845, and January, 1846, in full of all demands;" that the defendant should suffer J. Clark to sign his name, and that such purchase of the paper and such writing out and filling up, and permitting J. Clark to sign it, should be accepted by J. Clark in full satisfaction and discharge of the said causes of action. Fourth plea, to the third and fourth counts, *non assumpsit*; fifth, to the same, payment; sixth, to the same, the Statute of Limitations; seventh, to the same, a plea similar to the third plea.

In 1835, J. Clark agreed to lend the defendant 1000*l.*, on receiving two promissory notes for 500*l.* each. The notes were given, and the interest thereupon regularly paid by the defendant to J. Clark, who, on receiving it, was in the habit of indorsing a memorandum on the back of the notes. The backs of the notes being at length entirely covered, J. Clark proposed that the notes should be cancelled and others substituted, which was accordingly done, and the notes in question given by the defendant. In February, 1846, J. Clark, expressing a wish to make the defendant a present of the 1000*l.*, directed him to buy a 10*s.* stamp, and draw out a receipt for 1000*l.*, and 80*l.* for interest, which having been done, and the receipt having been signed by Clark, no further interest was paid. J. Clark subse-

¹ 20 Law J. Rep. (N. S.) Exch. 385.

Foster, Executor of Clark, v. Dawber.

quently died, having previously bequeathed the notes in question to his executors, with certain directions as to the investment of the proceeds:—

Held, first, that the transaction did not amount to a payment of the notes.

Secondly, that the third and seventh pleas were not supported.

Thirdly, that the second plea of discharge was proved; that a liability on a bill of exchange may be discharged by parol, whether between immediate or intermediate parties; and that the same rule applies to promissory notes; and, therefore, that the second plea was good on motion for judgment *non obstante veredicto*.

Lastly, that the giving of the receipt was not a part payment or acknowledgment of the debt, so as to take the case out of the Statute of Limitations; and that the renewal of the two notes in January, 1846, could not be considered as a promise so as to render the defendant liable by a new promise to pay the original notes.

ASSUMPSIT. The first and second counts were on two promissory notes of the defendant, dated the 7th of December, 1845, and the 20th of January, 1846, for 500*l.* each, and payable on demand to J. Clark, the testator. The third count was for money lent by the testator to the defendant, and the fourth count on an account stated between the testator and the defendant.

Pleas, to the first and second counts — First, payment; second, that after the making of the promissory notes, and before any demand of the sum of money, or of either of them, or of any interest thereon, and before any breach of the promise in the said counts mentioned, the said J. Clark in his lifetime exonerated, absolved, and discharged the defendant from, and then waived performance of, the promises and the payment of the said notes respectively; third, that, after the making of the promissory notes, it was agreed between the said J. Clark and the defendant that the said defendant should purchase a piece of paper marked with a certain receipt stamp, to wit, a 10*s.* receipt stamp of the value of 10*s.*, with the moneys of him the defendant; and that he should then fill up and write on the same to the tenor and effect following, that is to say: “Hull, February 16, 1846. Received of Robert Dawber the sum of 1080*l.*, being the principal and interest on two notes, dated December, 1845, and January, 1846, and in full of all demands;” and that he, the defendant, should suffer and permit the said J. Clark to sign the same, and that such agreement and purchase of the said piece of paper so stamped, and such writing out and filling up as aforesaid, and permitting the said J. Clark to sign the same, should be, and should be accepted and taken by the said J. Clark in full satisfaction and discharge of the said several causes of action in the introductory part of this plea mentioned. Fourth plea to the third and fourth counts, *non assumpsit*; fifth, payment; seventh, the Statute of Limitations; eighth, a plea similar to the third plea.

At the trial before Lord Campbell, C. J., at the last Surrey Spring assizes, the evidence was as follows: A bill filed against the defendant for discovery, and his answer thereto, were put in, from which it appeared that the testator had been a farmer, and that the defendant, who was his son-in-law, carried on business as an oil-cake and bone merchant at Kingston-on-Hull. During the year 1835, the defendant,

Foster, Executor of Clark, v. Dawber.

being in want of 1000*l.*, applied to the testator to lend him that sum at 4*l.* per cent. interest, which the testator consented to do, on receiving two promissory notes for 500*l.* each. The notes were accordingly given by the defendant, and the interest for several years afterwards paid to Mr. Clark, who, as he received it, was in the habit of regularly indorsing a memorandum of the fact on the notes. At length, the backs of the notes being entirely covered, Mr. Clark proposed that they should be cancelled and others substituted. In compliance with this proposal, the defendant drew out and delivered the notes upon which the action was brought. On the 16th of February, 1846, Mr. Clark being on a visit to the defendant at Hull, expressed a wish to make him a present of the 1000*l.*, and directed him to purchase a 10*s.* stamp, and draw up a receipt for 1000*l.* and 80*l.* interest, which he did, and Mr. Clark signed it. No interest was subsequently paid. On the 13th of January, 1850, Mr. Clark died, leaving a will, by which he appointed the plaintiff and another party executors, and bequeathed the two promissory notes in question to them to invest the money for the benefit of his wife, and after her death for the wife of the defendant, and at her decease for the defendant's children. The will was proved by the plaintiff alone.

On this evidence, it was contended, for the defendant, that all the pleas were proved. The learned judge, however, was of opinion that the facts supported the second, third, and seventh issues alone, and directed a verdict to be entered for the defendant on them, and for the plaintiff on the others, reserving leave to each party to move the court to enter the verdict on those issues which were found against him.

Shee, Serj., having obtained a rule *nisi* to enter a verdict for the defendant on the first, fourth, fifth, and sixth issues; and

Montagu Chambers having obtained a rule to enter a verdict for the plaintiff on the second, third, and seventh issues, or for judgment *non obstante veredicto*,—

Montagu Chambers and *Willes*, for the plaintiff, showed cause¹ against the former rule. First, the defendant is not entitled to have a verdict entered for him on the first and fifth issues, which relate to payment, for the pleas of payment were not supported. Those pleas mean payment in money; the mere giving of a receipt by a party, and a statement by the party receiving that he has been paid, is not evidence of payment. A debt cannot be got rid of unless either something has been received in satisfaction, or there has been a release under seal. The only exception to this rule is where parties state accounts. There is a distinction in this respect between our law and the civil law. *Smith's Mercantile Law*, by *Dowdeswell*, 480; *Code Civile*, Book B, tit. 3, sect. 3.

[*Parke*, B. It will probably be urged on the other side that the

¹ June 27, before *PARKE*, *ALDERSON*, *PLATT*, and *MARTIN*, BB.

Foster, Executor of Clark, v. Dawber.

money had, in substance, been paid by the defendant to the testator, and had been given back to the defendant.]

That view of the case is not supported by the evidence. Secondly, the defendant is not entitled to enter a verdict on the sixth issue, which relates to the Statute of Limitations pleaded to the common counts, inasmuch as there has been an account stated in the defendant's answer. Besides, promissory notes have been given, so that the Statute of Limitations does not apply. The plaintiff is also entitled to succeed on *non assumpsit*.

Shee, Serj., and *Bramwell*, in support of the rule. First, as to the first and fifth pleas, which relate to payment. The transaction, in effect, amounted to a handing over of money by the defendant to the testator, and a handing it back to the defendant. If all the facts are taken in connection with the receipt, there is evidence in support of the plea of payment. This is in accordance with the civil law, and also the French law. They cited *Sibree v. Tripp*, 15 Mee. & W. 23; s. c. 15 Law J. Rep. (N. s.) Exch. 318. *Thomas v. Heathorn*, 2 B. & C. 477.

[*Parke*, B. The parties intended to settle the debt without a release, and for that purpose a receipt is given. But how can a receipt be turned into a release?]

Secondly, the defendant is entitled to succeed on the sixth plea of the Statute of Limitations; for the evidence did not relate to a loan of money, but to the giving of a promissory note on an advance of money by the testator to the defendant. *Cur. adv. vult.*

The following judgment was now (June 28) delivered by

PARKE, B. The two points on which we are disposed to give our opinion at present are, in the first place, whether the plea is proved which states that the amount of these two notes was paid. We are of opinion, in accordance with the opinion of the lord chief justice, on that part of the case, that the transaction stated in the answer does not amount to a payment of those notes. What took place, as it is described, is this: that the testator was desirous of making a present to the defendant of these notes, and that they met together on the 16th of February, 1846, on which occasion it was agreed between the said Joseph Clark and the defendant, that he, the defendant, should purchase a piece of paper marked with a certain receipt stamp, to wit, a 10s. receipt stamp of great value, to wit, of the value of 10s., with the moneys of him, the defendant, and that he should then fill up and write on the same to the tenor and effect following, that is to say: "Hull, February 16, 1846. Received of Robert Dawber the sum of 1080*l.*, being the interest and principal on two notes, dated December, 1845, and January, 1846, and in full of all demands." When that receipt in full was given, it was *prima facie* evidence against the plaintiff that the amount stated on it was paid. It was not conclusive evidence, because it was perfectly competent for the parties to contradict such a receipt by showing that the money

Foster, Executor of Clark, v. Dawber.

was not paid. Now, in this case, both Clark and the defendant knew perfectly well that the interest and principal of 1080*l.* were not paid; both parties knew the truth of the transaction. I think it was, therefore, perfectly competent to show that this receipt in full was not true. Then, it is said, it afforded an inference of the agreement of the parties, that, although the money was not paid, they should be precisely in the same situation as if it had been paid. I think that this receipt in full cannot go so far as to put them in the same situation as if the money had been paid by the defendant in discharge of his promissory note, and afterwards given by Clark to the defendant; and that a good deal more was required than a mere receipt in full to prove that the transaction was of that nature. I think, therefore, the plea of payment in this case is not proved. It differs entirely from a case where parties settle an account, where one admits a set-off against the other, in order to give it validity and to make it binding. The courts consider that, under those circumstances, they are upon the same footing as if the debt due from the plaintiff to the defendant were paid by the plaintiff to the defendant, and then paid by the defendant to the plaintiff, instead of going through the process of one set-off against the other.

The next question is upon the other part of the case, which my lord left to the jury, and reserved for our consideration, whether we thought there was evidence to go to the jury on the third plea, in which it is averred there was accord and satisfaction between the two parties. It is averred that there was a bargain between the plaintiff and the defendant in the nature of accord and satisfaction. The plea is, "And for a further plea to the first and second counts the defendant says, that after the making of the promissory notes it was agreed between the said Joseph Clark and the defendant, that he, the said defendant, should purchase a piece of paper marked with a certain receipt stamp, to wit, a 10*s.* receipt stamp of great value, to wit, of the value of 10*s.*, with the moneys of him, the defendant, and that he should then fill up and write on the same to the tenor and effect following, that is to say: 'Hull, February 16, 1846. Received of Robert Dawber the sum of 1080*l.*, being the interest and principal on two notes, dated December, 1845, and January, 1846, and in full of all demands;' and that he, the defendant, should suffer and permit the said Joseph Clark to sign the same, and that such agreement and purchase of the said piece of paper so stamped, and such writing out, filling up by the defendant as aforesaid, and such suffering and permitting the said Joseph Clark to sign the same as aforesaid, should be, and should be accepted and taken by the said J. Clark in full satisfaction and discharge of the said several causes of action in the introductory part of this plea mentioned." Now, in order to support that plea, the defendant must show that there was a bargain made with him, as a consideration for giving up these notes of 1000*l.*, that the defendant should go and purchase a stamp, procure a piece of paper, and write out a receipt upon it; and that the agreement between the parties was, that the sum of 1000*l.* should be the compensation to be paid for it. If you look at the evidence, it is per-

Foster, Executor of Clark, v. Dawber.

fectly impossible to suppose that that was the real meaning of the parties, because it has already appeared, from what I have stated in the answer, that the transaction commenced by the testator saying that he was willing to make a present of the debt. There is nothing in the nature of a bargain that he would make a present if the other would be at the trouble of making out a receipt and purchasing the stamp. The conversation began, after talking over family matters, by the statement of Joseph Clark, "that he intended to give the defendant the 1000*l.* secured by the said two promissory notes," — that is the commencement of it, — "that he wished to give the defendant the 1000*l.* secured by the said two promissory notes, and that he, the said Joseph Clark, wished to give the defendant a release and discharge from the same, and for the interest thereon, before he left Hull; and the said Joseph Clark directed the defendant to write out a receipt for such 1000*l.*," not by way of bargain that, if he should do it, he should have the promissory notes, otherwise not. It appears, from the first, that the intention of Clark was to make a present to the amount of these promissory notes. It goes on to state that he afterwards did purchase the 10*s.* stamp, for the purpose of writing a receipt thereon. If you take this altogether, really it is too much to say that it was parcel of this bargain that the 1000*l.* should be given up if the defendant wrote the receipt, but should be retained by the testator if he did not. It was nothing more than a circumstance incident to the intended gift by the testator. That gift would just as soon have taken place if Clark himself had had to write out the receipt as if the defendant had. In taking a reasonable view of the evidence in this case, I am clearly of opinion, and in that opinion my brothers entirely agree with me, that there was no evidence that would warrant the jury in supposing that there was a bargain approaching to so absurd a bargain as that which is stated; therefore, we think the verdict ought to stand for the plaintiff on the third issue.

With respect to the other two points, we will take further time to consider. Those two points are, whether there is by the law merchant a different rule with regard to bills of exchange than there is as to ordinary contracts; and, secondly, whether there should be a new trial upon the ground that there is no sufficient evidence to take the case out of the Statute of Limitations; and whether the law as to bills of exchange extends to promissory notes.

Shee, Serj., and *Bramwell* then showed cause¹ against the rule obtained by *Montagu Chambers*, to enter a verdict for the plaintiff on the second, third, and seventh issues. First, the second plea of exoneration and discharge was fully proved, and is also valid. The argument on the other side will be that, in the case of a promissory note payable on demand, a breach occurs as soon as the instrument has been delivered; that after breach a person cannot be absolved from the contract into which he has entered, except by

¹ June 28, before PARKE, ALDERSON, and PLATT, BB.

Foster, Executor of Clark, v. Dawber.

release under seal or by payment; and that, as no such release or payment was shown here, the defendant must fail. But, conceding that the principle thus stated is true with reference to contracts generally, it is submitted that it is not applicable to bills. The law relating to those securities is correctly expressed in *Byles on Bills*, 5th ed. X, 145: "It is a general rule of law, that a simple contract may before breach be waived or discharged without a deed or consideration, but after breach there can be no discharge except by deed or upon sufficient consideration. To this rule, it is said that contracts on bills which are regulated by the custom of merchants form an exception, and the liability of the acceptor, though complete, may be discharged by an express renunciation of his claim on the part of the holder." And the rule which governs bills must also be held to extend to promissory notes, since those instruments were placed on the same footing by the 3 & 4 Anne, c. 10. But, further, it is incorrect to say that the discharge was given after breach. The position contended for by the plaintiff is unintelligible and repugnant to common sense. A breach does not take place until after a demand and refusal to pay. Tender of the amount before that event would be good, and might be pleaded. Therefore, even according to the plaintiff's own argument, the discharge here was good. Secondly, the third and seventh pleas were also established. What took place on the 16th of February clearly amounted to an accord and satisfaction. For this agreement, the consideration was the purchase of the stamp and the preparation of the receipt; and there being a consideration, the court will not stop to estimate its value, or say whether it was sufficient or insufficient. Thirdly, there was no evidence to take the case out of the Statute of Limitations. The receipt acknowledging the payment of interest was not such a proof of part payment as would prevent the operation of the act. That document is a proof, if any thing is a proof, that the whole debt was liquidated, and that the plaintiff has no claim.

Willes, in support of the rule. The second plea was not supported by the evidence, and is also bad after verdict on a note similar to those mentioned in the declaration. A breach of the promise occurs immediately on the note being given, and it is a well recognized principle of law, that a contract cannot be discharged after breach, except by release or payment. But then, it is urged that bills of exchange form an exception, and that an obligation created by them may be extinguished by parol. The cases, however, from which this proposition has been deduced do not support it. In *Dingwall v. Dunster*, 1 Dougl. 247, it was decided that the circumstance of the indorser of an accommodation bill writing to the acceptor to say that he had discovered the real debtor, and would not press him for payment, was insufficient to exonerate him from liability. In *Black v. Peele*, referred to in *Dingwall v. Dunster*, 1 Dougl. 248, a new security had been given. In *Adams v. Gregg*, 2 Stark. 531, Abbott, C. J., intimated his opinion, that a declaration by a person who had taken up a bill for the drawer that the acceptor should not be troubled would not

Foster, Executor of Clark, v. Dawber.

operate to discharge him from payment; and in *Farquhar v. Southey*, 2 Car. & P. 497, similar views are expressed by Littledale, J. At any rate, these cases do not establish any thing more than that the obligation may be discharged by a parol agreement as between the indorsee and acceptor, but not between the immediate parties. But, admitting that they even do support the latter proposition, still they do not assist the defendant, as they relate only to bills. And it is fallacious to say that promissory notes are placed on the same footing with bills by the statute of Anne. In some respects, indeed, they are assimilated, but not in all; and in those cases where they are not, they must be governed by the general rule applicable to contracts. Lastly, there was ample evidence to take the case out of the Statute of Limitations. The giving of the new securities in 1845 and 1846 was an acknowledgment of the old debt, and the receipt showed a part payment within six years so as to prevent the operation of the act.

Cur. adv. vult.

The judgment of the court was now (June 30) delivered by

PARKER, B. In this case, the argument in which was concluded on Saturday, the court delivered its opinion upon all the points in the case except two: one was with respect to a plea in an action on two promissory notes for the sum of 500*l.* each, and there was a special plea. [His lordship read the second plea.] It appeared, on the trial, in proof of that plea, that on the 16th of February, 1846, the testator was desirous of releasing the defendant from these two notes. A meeting took place, and he desired the defendant to procure a receipt stamp; that he gave a receipt in full for 1000*l.*, the amount of the two notes, and 80*l.* supposed arrears of interest for two years; and there is no doubt that the effect of the transaction was to indicate as clearly as possible that the testator meant to discharge the defendant from all liability upon the notes. But then it was contended that the plea was not proved, because this was not, properly speaking, before breach. Now, this plea is certainly inartificially drawn, and is a plea copied from a similar plea to be found in the precedents of the discharge of an executory contract. It was competent for both parties to an executory contract by mutual agreement without any satisfaction to discharge the obligation of that contract. It is not competent to the parties when there is an executed contract to discharge it in any way except by release under seal, according to the nature of the obligation or payment, if the obligation may be performed by payment — performed and not discharged. Now, a promissory note or a bill of exchange appears to stand on a different footing; and we think the words “before breach,” when they are spoken with reference to a promissory note, are either idle or absurd. We think they are of that character, or, if they have any meaning in this plea, they must be read in conjunction with the context. Then, taking the plea altogether, it is an allegation that the testator discharged the defendant from all liability before any demand of the sum of money mentioned in the notes: if that is the true meaning of the plea, it was proved at

Foster, Executor of Clark, v. Dawber.

the trial, because it was proved that the testator exonerated the defendant before he called on him to pay the amount of those notes; therefore, we are of opinion that this plea is proved.

The next question is, liberty being reserved in case that the plea should be proved and a rule granted to give the plaintiff judgment *non obstante veredicto*, whether this plea is a good plea after verdict. In the first place, it was disputed by the plaintiff's counsel that there was any such law that an obligation on a bill of exchange could be discharged by parol; and he questioned the decisions, and he said that at all events they went no further than this; that an obligation might be discharged as to remote parties, but not discharged with respect to the obligation of one immediate party to pay another; because that obligation, he considered, was not created by the law merchant, and it was only by the law merchant that a bill of exchange could be discharged. It has been so often laid down and acted upon, although there is no case immediately to the point between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late to question the propriety of those decisions. Several cases were cited by the plaintiff's counsel and referred to, and the matter is laid down in the text books as law, although my brother Byles in his book uses the words "it is said." We see no reason to dispute that law; we think it is valid and good law. Nor do we see any reason to draw a distinction between the liability of an immediate party, or the liability of one party to another. Where there are intermediate parties, the liability of both equally turns on the law merchant; for no one person is liable on a bill of exchange, except through the law merchant, and probably this law merchant being introduced into this country, and differing very much from the simplicity of common law, probably at the same time was introduced into it that rule which the plaintiff's counsel quoted from Paillet, that, by the laws of foreign countries, there may be a release and discharge from the debt by express words, although unaccompanied with satisfaction or any solemn instrument. That appears to be the law of France, and probably it was for that reason it was adopted. At all events, it is too late now to say this is not a branch of the law merchant with respect to bills of exchange. Then, the plaintiff's counsel said, though it might be true with respect to bills of exchange, it was not true with respect to promissory notes, for that they are not put upon the same footing as bills of exchange by the statute law. There is no doubt the obligation on promissory notes was created by the stat. 3 & 4 Anne, c. 9, which recites that "notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over" (that is one of the properties promissory notes are recited not to have) "within the custom of merchants to any other person, and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same, and that any person to whom such note shall be assigned,

Foster, Executor of Clark, v. Dawber.

indorsed, or made payable, could not within the said custom of merchants maintain any action upon such note against the person who first drew and signed the same." That appears to apply both to cases of original liability on a note, and also to cases where the note is assigned. We think the stat. 3 & 4 Anne, c. 9, put promissory notes entirely on the same footing as bills of exchange, and the same law applies to them. Now, bills of exchange and promissory notes differ from other contracts at common law in two important particulars. In the first place they are assignable, whereas choses in action at common law are not. In the second place, the instrument itself gives a right of action, for it is presumed to be given for value, and no value need be alleged as a consideration for it. In those two important particulars bills of exchange differ from contracts at common law, and in those same particulars promissory notes are put on the same footing by the statute of Anne; therefore, we think, the same law applies to promissory notes as applies to bills of exchange; and that was considered by the court, although their opinion was certainly not necessary to be expressed to that extent in order to decide the case, in *Mayhew v. Kerr*,¹ a case which was tried before me, in which there was such a plea on the record — that a promissory note was waived and discharged by parol. We think, therefore, the rule in this case for entering the judgment for the plaintiff *non obstante veredicto* must be discharged.

The remaining question is on the motion for a new trial. The plea that the notes were discharged was pleaded only to the notes. But on the count for money lent and advanced there was no plea that notes were given, and that the defendant was exonerated from those notes by the testator; to that count for money lent and advanced nothing is pleaded but the Statute of Limitations. Now, the money that was lent and advanced by the testator in the year 1835 was 500*l.*, and in the year 1842, 500*l.* more. For each sum there was given a promissory note, payable to the testator or order, and interest on those notes was paid up to the year 1844. In the beginning of the year 1846, that transaction took place which the defendant pleaded as the payment of the notes, and which we consider to be an exoneration by the testator of the defendant. For these two notes, the backs of them having been, in fact, covered by acknowledgments of interest, two other notes were substituted in the year 1846; one was dated the 17th of December, 1845, and the other the 20th of January, 1846; and in the succeeding month, on the 16th of February, 1846, the testator intimated his intention to the defendant to give him a discharge from both notes; and accordingly a receipt stamp was procured, and Clark, the testator, gave a receipt in full to the defendant for the amount of these notes, and also for the sum of 80*l.*, which was calculated to be the amount that was then due for interest, being about two years' interest or some little more. Then a receipt was given, in these words: "Received of Robert Dawber the sum of 1080*l.*, being interest and principal on the two notes, dated

¹ Not reported.

Foster, Executor of Clark, v. Dawber.

December, 1845, and January, 1846, and in full of all demands." Now, it was argued for the plaintiff, at the trial, that this transaction, which occurred in February, 1846, must be considered as part payment, and so that the case was taken out of the statute. But, on consideration, we are of opinion that this argument is unsatisfactory. There was no proof of any actual payment of the sum of 80*l*. for interest in the month of February. It was all parcel of the same transaction; and the supposed payment, which was only by construction a payment of two years' interest, was only a parcel of the transaction, in which the defendant by no means promised to pay the notes, but the contrary. It was no "part payment" within the Statute of Limitations, supposing it to be proved within the statute; because "part payment" within the statute means payment of a portion accompanied with an acknowledgment of a greater demand being due; that is the only ground on which a part payment takes the case out of the statute. This transaction on the 16th of February was a transaction in which the defendant meant to pay the whole in full; and if there was any payment it was a payment of the notes, and not evidence of part payment or acknowledgment; it was payment of the notes in full, and there was no acknowledgment whereby the defendant took on himself to pay any portion of the money whatever. Therefore, we think the transaction on the 16th of February cannot be considered as any acknowledgment to take the case out of the statute. Then the only question is, as it occurred to the court on the first view of the case that there might be sufficient to take the case out of the statute, whether the renewing of the two promissory notes by fresh ones in January, 1846, could be considered as a promise, so as to render the defendant liable by a new promise to pay the original two loans of 500*l*. each. Now, we think that they could not. All that can be inferred from these two notes is, that the defendant meant to give a fresh security, limited to those two notes; that it was a promise to pay the testator or the legal holder of these notes, and no intention on the part of the defendant to renew his liability on the original demand. The promise was confined to the notes themselves, and we think there was no sufficient evidence to take the case out of the Statute of Limitations in regard to the original debt, and that the plea ought to have been found for the defendant. Inasmuch as that point was not reserved, there must be a new trial.

Rule to enter a verdict for the plaintiff on the second issue, or for judgment non obstante veredicto, discharged.

Rule absolute to enter a verdict for the plaintiff on the third and seventh issues.

Rule to enter a verdict for the defendant on the other issues discharged.

Rule absolute for a new trial as to the sixth issue.

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF EXCHEQUER.]

TURNER & others, Assignees, v. THE TRUSTEES OF THE LIVERPOOL DOCKS.¹

Trinity Term, May 26, 1851.

Stoppage in Transitu — Bill of Lading making Cargo deliverable to Consignor's Order — Delivery on board Consignor's Vessel — Pleading — Not possessed.

B. & Co., merchants at Liverpool, sent orders to M. & Co., merchants at Charleston, to ship, on account of B. & Co., a cargo of cotton, on board a vessel of B. & Co.'s, which was sent to Charleston with an outward cargo, and also to receive the cotton. M. & Co. thereupon purchased cotton from time to time and shipped it on board B. & Co.'s vessel. The master of the vessel executed to M. & Co. a bill of lading, which stated that the cotton was to be delivered at Liverpool, "to order, or to our assigns, paying for freight for the cotton nothing, being owners' property." M. & Co. indorsed the bill of lading, "Deliver the within to the Bank of Liverpool, or order. M. & Co." Afterwards, M. & Co. sent to B. & Co. an abstract invoice of the cotton, in which they stated that they had shipped the cotton on board the vessel, "by order, and for account and risk," of B. & Co., and addressed "to order;" and still later, they sent to B. & Co. a full invoice, stating that the cotton was shipped "by order, and for account of B. & Co., and to them consigned." M. & Co. not having sufficient funds of B. & Co. to pay for the cargo of cotton, drew bills on B. & Co. for the amount, and wrote to B. & Co., informing them of the drawing of the bills, and desiring them to insure the cotton. M. & Co. sold the bills they had so drawn to the bank at Charleston, and delivered to the bank the bill of lading, so indorsed, as a security for the payment of the bills, which were ultimately dishonored, and taken up by M. & Co. B. & Co. became bankrupts before the arrival of the vessel. M. & Co., by means of their agent, on its arrival, put in a claim to the cargo. The assignees of B. & Co. brought detainee against M. & Co.'s agents, who pleaded that the bankrupts, B. & Co., were not possessed, and that the plaintiffs were not possessed, as assignees:—

Held, that M. & Co. had never parted with the property in the cotton to B. & Co., notwithstanding the delivery on board the vessel of B. & Co., because M. & Co. had, at the time of the delivery, reserved to themselves a *jus disponendi*, and preserved their rights as unpaid vendors; which the captain acknowledged by signing the bill of lading, making the cotton deliverable to their order, or assigns, although, in executing such a bill of lading, the captain might have exceeded his authority:—

Held, also, that M. & Co. did not, by transferring the bill of lading as security to the bank at Charleston, lose their property in the goods, so as to prevent their claiming them as against B. & Co., or their assignees, and that the defence might be raised under the plea of not possessed.

THIS was an action of detainee by the plaintiffs, as assignees of Messrs. Higginson & Dean, bankrupts, who traded under the name of Barton, Irlam, & Higginson, to recover from the defendants a large quantity of cotton and timber.

The first count laid the property in the bankrupts, the second in the assignees.

The first two pleas traversed the property in the goods as alleged in the two counts. The third plea alleged that the goods were the property of the Bank of Liverpool.

The case was tried before Wightman, J., on the 23d of August,

¹ *Coram* PATTESON, COLERIDGE, WIGHTMAN, EARLE, TALFOURD, and WILLIAMS, JJ.
20 Law J. Rep. (n. s.) Exch. 393.

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

1849, when the following facts were found: The property consisted of the cargoes of two vessels, the Charlotte and the Higginson, of which the bankrupts were owners. [As the circumstances relating to each were similar, and the same question arose in each, and the argument was confined to the case of the Charlotte, it is only necessary to state the facts relating to the cargo of that vessel.]

On the 18th of August, 1847, the bankrupts sent orders to Menlove & Co., merchants at Charleston, in America, directing them to ship on board the Charlotte, on their (the bankrupts') account, a large quantity of cotton for the homeward voyage. The vessel had sailed with a cargo of salt and coals consigned to Menlove & Co., and arrived at Charleston on the 19th of September. Menlove & Co. in the mean time had, in pursuance of the orders of the bankrupts, purchased a large parcel of cotton, and continued to make fresh purchases until shortly before the Charlotte sailed on the homeward voyage. They also shipped on board a quantity of timber.

On the 13th of October, the master of the Charlotte signed the following bill of lading, and delivered it to E. Menlove & Co.: "Shipped in good order and condition, by E. Menlove & Co., of, &c., upon the, &c., Charlotte, &c., now lying in the port of Charleston, and bound for Liverpool, 1263 bales of Upland cotton, 74,871 feet plank, &c., to be delivered in like good order and condition at the aforesaid port of Liverpool, &c., unto order or to our assigns, he or they paying freight for the said goods, viz., for cotton in round bales, for cotton in square bales, nothing, being owners' property," &c.

It was indorsed, —

"Deliver the within to the Bank of Liverpool or order.

"E. MENLOVE & Co."

The Charlotte sailed from Charleston on the 13th of October.

On the 16th of October, Menlove & Co. wrote to the bankrupts, informing them that they had drawn bills on them in respect of the cargo, and that they had deferred drawing as long as possible to give the ship time to be with them before the draft, and directing them also to insure the cargo.

On the 19th of October, Menlove & Co. sent the bankrupts an abstract invoice of the cotton dated the 13th of October. It was headed — "Abstract invoice of 1263 bales of Upland cotton, shipped by E. Menlove & Co. on board the British ship Charlotte, Carter, master, for Liverpool, by order and for account and risk of Messrs. Barton, Irlam, & Higginson there, and addressed to order." The full invoice of the cotton, also dated the 13th of October, was sent on the 23d of October to the bankrupts. It commenced thus: "Invoice of 1263 bales Upland cotton, shipped by E. Menlove & Co. on board the British ship Charlotte, Carter, master, for Liverpool, by order and for account of Messrs. Barton, Irlam, & Higginson there, and to them consigned."

It appeared further, that Menlove & Co., not having sufficient funds of the bankrupts to pay for the whole of the cotton and plank, drew bills of exchange on the bankrupts, and sold the bills which they had drawn to the bank of Charleston, and delivered to them the bill of

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

lading, indorsed as above stated, as a security for the payment of the bills. Evidence was given to show that this was the usual mode of dealing. The bills of exchange were, with one exception, dishonored, and taken up by Menlove & Co.

On the 23d of October, Menlove & Co. informed the bankrupts of the delivering over of the bill of lading to the bank at Charleston. Barton, Irlam, & Higginson became bankrupts on the 13th of November. The Charlotte arrived at Liverpool on the 26th of November. The following day, notice was given to the master that E. Menlove & Co. claimed to stop the cargo *in transitu*, and required him to deliver it to the Bank of Liverpool or their agent. The cargo was stowed in the defendants' warehouses.

An objection was made by the plaintiffs to the reception of certain evidence offered by the defendants and admitted by the judge. It was agreed on both sides that there was no question of fact for the jury. The learned judge directed a verdict for the defendants on all the issues.

A bill of exceptions was tendered to this direction; and the case was argued (November 30th and December 2d, 1850) by

Crompton, for the plaintiffs. The principal question is, whether the direction of the learned judge, that the defendants were entitled to have the issues found for them on the property in the goods, is right in law. It is submitted that the property in, and the possession of, the cotton vested in the bankrupts as soon as it was put on board the Charlotte. Any right of lien, or stoppage *in transitu*, which stands on the same footing, was gone by the delivery on board of the vendees' own ship, as it was put on board for, and on account and risk of, the bankrupts. *Van Casteel v. Booker*, 2 Exch. Rep. 691; s. c. 18 Law J. Rep. (N. S.) Exch. 9. The evidence shows that the contract was to deliver the cotton to the bankrupts on board their ship, which was sent out on purpose to receive it. Had the ship merely been hired by the bankrupts, the case would have been very different. A foreign merchant is under no obligation to obey the orders sent him with respect to the purchase of goods. He has a right to keep possession of the goods by sending them home in a carrier ship, and by consigning them to his own agent in England, to be delivered on payment to the party who has sent out the order for them. It is clear that Menlove & Co. intended that the property should pass to the bankrupts on delivery, for, in the letter of the 16th of October, they say that they have drawn the bills of exchange at a long date, in order to give the bankrupts time to realize money by the sale of the goods. The fact that the goods are stated in the bill of lading to be owners' property and freight free shows that the contract was one of absolute sale, to be executed by delivery on board of the vessel. Menlove & Co. could not have had a right to use the vessel of the bankrupts to carry their goods without payment of freight, nor could they have had any right to pledge the bill of lading, for by so doing they profess to give the indorsee of it a greater interest than they had themselves; that is, a security on the goods at the port of discharge,

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

and increased in value by the amount of the freight. If the court decide against the plaintiffs, they will lose both goods and freight. Had Menlove & Co. shipped the goods in their own names, they paying freight, the case might possibly have been different. Here their conduct was marked by an improper concealment, which would deprive them of all right; *Ogle v. Atkinson*, 5 Taunt. 759; or the attempt to retain possession of the goods was an afterthought. Had the bankruptcy not taken place, Menlove & Co. would have had a right to sue for the price as for goods sold and delivered. The bankrupts were to insure. Suppose there had been a loss, the bankrupts might surely have sued on the policy against the assurance office. The case is the same as if the bankrupts had personally received the cotton on board the Charlotte. Secondly, the captain had no power to alter the rights of his employers at home by executing such a bill of lading as this, making the goods deliverable to the orders of Menlove & Co.

[*Patteson*, J. Do you contend that the bill of lading was an idle, nugatory document in every respect?]

Yes; so far as it could prejudice the vendees' right. The captain acted improperly in signing the bill of lading. As the ship was sent out for the express purpose of receiving the goods, the captain had no right to agree to deliver the goods to any one but his employers. He had no authority to execute the bill of lading.

[*Erle*, J. Suppose that the consignors intended to keep their hands on the goods, and refused to part with the possession unless the captain had agreed to the special terms, and the captain had received the goods on these terms; do you say that the property vested in the bankrupts?]

It is submitted that the captain's unauthorized assent could not have varied the effect of the contract, and that by the delivery the contract would have been executed. Thirdly, if the consignors had a lien, that could not be transferred by them to the Liverpool Bank. The right to stop *in transitu* was lost by the assignment. On these points he referred also to the following authorities: *Wait v. Baker*, 2 Exch. Rep. 1; s. c. 17 Law J. Rep. (N. S.) Exch. 307. *Jenkyns v. Brown*, 19 Law J. Rep. (N. S.) Q. B. 286. *Mitchel v. Ede*, 11 Ad. & E. 888; s. c. 9 Law J. Rep. (N. S.) Q. B. 187. *Saville v. Campion*, 2 B. & Ald. 503. *Small v. Moates*, 9 Bing. 574. *Newsom v. Thornton*, 6 East, 17. *Haille v. Smith*, 1 Bos. & P. 563. *Fowler v. M' Taggart*, cited in *Hodgson v. Loy*, 7 Term Rep. 442. *Inglis v. Usherwood*, 1 East, 515. *Bohtlingk v. Inglis*, 3 East, 381. *Howes v. Ball*, 7 B. & C. 481; s. c. 6 Law J. Rep. K. B. 106. *Coxe v. Harden*, 4 East, 211. *M' Combie v. Davies*, 7 Ibid. 5. *Daubigny v. Duval*, 5 Term Rep. 604. *Case of the Constantia*, 6 Rob. Adm. Rep. 321. Abbott on Shipping, p. 289, 517, 522. Fourthly, if there were this lien, the right could not be set up without a special plea, and was not capable of being given in evidence under a plea of *non detinet* or not possessed. *Legg v. Evans*, 6 Mee. & W. 36; s. c. 9 Law J. Rep. (N. S.) Exch. 102. *Mason v. Farnell*, 12 Ibid. 674; s. c. 13 Law J. Rep. (N. S.) Exch. 142. *Lane v. Tewson*, 12 Ad. & E. 116, n.; s. c. 11 Law J. Rep. (N. S.) Q. B.

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

17. Lastly, the evidence objected to was improperly received. This would entitle the plaintiffs to a *venire de novo*.

Cowling, for the defendants. The property in the goods did not pass to the bankrupts by the delivery to the master on board the *Charlotte*. Menlove & Co. retained the right to them as unpaid vendors. When they purchased the cotton, they had no sufficient funds of the bankrupts to pay for the goods. To raise money they had, according to the usage, to draw bills of exchange on the bankrupts, and to discount them, and to pledge the bill of lading as a security for the payment of the bills of exchange. When first purchased, the property in the cotton clearly vested in Menlove & Co.; and, until they delivered it on board, they might have disposed of it in any way they pleased. *Atkinson v. Bell*, 8 B. & C. 277; s. c. 6 Law J. Rep. K. B. 258. No doubt Menlove & Co. intended to appropriate that cotton to the bankrupts, but that intention did not pass the property. They did not, by accepting the bankrupts' orders, undertake to ship the cotton on board as the bankrupts' property. The contention that the goods became the bankrupts' by the mere fact of shipment, independent of the intention of Menlove & Co., and independent of the act of the master, is not supported by any of the authorities. The terms of the bill of lading are strong evidence to show that Menlove & Co. intended to retain the legal property in the goods. The statement in the bill of lading that the goods were owners' property and freight free, cannot override the manifest intention of Menlove & Co. to retain their right in the goods by making them deliverable to order. The invoice, which states that the cotton was shipped on account of, and at the risk of, the bankrupts, only shows that the insurance was to be made at their cost and risk. The bankrupts had an insurable interest in the goods, but not the absolute property after they were put on board. *Arnold on Insurance*, p. 251, and *Smith v. Lascelles*, 2 Term Rep. 187. They would not have lost their freight, for the Court of Chancery would have taken care that Menlove & Co. should not keep more out of the proceeds of the goods than the purchase price, and the surplus would have belonged to the bankrupts. Thus, indirectly, they would have obtained the profit of the freight. Secondly, it is submitted that, if the master received the goods on board as the goods of Menlove & Co., it can make no difference whether in so doing he acted rightly or wrongly. But it is apprehended he was justified in what he did. If Menlove & Co. were authorized to ship the goods in the ordinary course of business, (that is, subject to such a lien as was necessary for the security of the parties who advanced the funds to pay for them,) the master was justified in receiving them subject to the same rights. The bankrupts were not damaged in any way by the captain's accepting the goods, subject to qualification. Nor were Menlove & Co. guilty of any fraud on the bankrupts in imposing such terms.

[*Cresswell, J.* Suppose the bankrupts had given rigid instruction to the captain not to receive any goods on board except as their abso-

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

lute property, that would not have obliged Menlove & Co. to have delivered the goods on those terms.]

The cases which have been cited do not apply. In *Wait v. Baker*, the terms of the charter party do not appear. In *Van Casteel v. Booker*, the question was put on the principle now contended for on behalf of the defendants, namely, What was the intention of the parties at the time of the shipment? The case of *Coze v. Harden* has never been quoted with approbation, and is in part overruled in *Morison v. Gray*, 2 Bing. 260; s. c. 3 Law J. Rep. C. P. 261, and *Brandt v. Bowlby*, 2 B. & Ad. 932; s. c. 1 Law J. Rep. (n. s.) K. B. 14. *Ogle v. Atkinson* is not reconcilable with *Mitchel v. Ede* or *Ellershaw v. Magniac*,¹ and can only be supported on the ground of fraud; but the principle was asserted that, in the absence of fraud, the delivery may be a qualified delivery. Thirdly, it is contended that, if Menlove & Co. had a lien on the goods, they could not transfer it to a third party. The rule is correct as regards an ordinary lien; but an unpaid vendor has a property in, and a title to, the goods differing from and greater than an ordinary lien, and which is not destroyed by parting with the possession. *Jenkyns v. Brown*. There are many cases in which a lien is transferable. If the court hold that Menlove & Co. had no right to retain a lien on the goods, the decision will produce very inconvenient results to the trade between England and America. Fourthly, there was no necessity for pleading the lien specially. *Lane v. Tewson* is rightly decided. There is great difficulty in pleading a lien in detinue.

Crompton, in reply. Menlove & Co. could not have the right of lien of unpaid vendors, because the goods were sold on credit, and not for ready money. There was no proof of any usage of trade authorizing Menlove & Co. to ship the goods on the terms contended for.

[*Cresswell, J.* May not the captain make an admission that the shipper of the goods delivered them to him with a limited trust only, and not as the absolute property of the ship owner? The question is, whether the consignor could deliver them on board without making them the absolute property of the ship owner.] *Cur. adv. vult.*

Judgment was now delivered by

PATTESON, J. This is an action to try the right of the plaintiffs, as assignees of Messrs. Higginson, Dean, & Hall, who were merchants in Liverpool trading under the name of Barton, Irlam, & Higginson, who had become bankrupts, to the possession of a quantity of cotton and timber as against Messrs. Menlove & Co., who were merchants in Charleston, in America, and the real defendants in this suit. The property in dispute constituted the cargoes of two vessels, of which the bankrupts were owners, called the *Charlotte* and *Higginson*, and as it is agreed that the same question arose with respect to both, and

¹ Not reported.

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

as the circumstances are similar, it will be only necessary to advert to the leading facts relating to one of them, the Charlotte.

It appears that, in August, 1847, the bankrupts sent orders to Menlove & Co. at Charleston to ship on their (the bankrupts') account a quantity of cotton for the homeward cargo of the Charlotte, a ship belonging to the bankrupts, which had been sent to America with a cargo of coals and salt, and which arrived at Charleston on the 19th of September. In the mean time, Menlove & Co. had made considerable purchases of cotton in execution of the order, and continued to make further purchases until within a day or two of the sailing of the Charlotte on her homeward voyage with the cotton on board, namely, on the 13th of October. On the 12th of October, the master of the Charlotte signed the bill of lading of the cotton to be delivered at Liverpool "to order or to our assigns, paying for freight for the cotton nothing, being owners' property;" and Menlove & Co. indorsed the bill of lading in these terms: "Deliver the within to the Bank of Liverpool or order. Edward Menlove & Co." Messrs. Menlove & Co. informed the bankrupts from time to time of these purchases as they were made, and on the 16th of October they informed the bankrupts of the sailing of the Charlotte, and that they had drawn bills upon them of several dates, the earliest being of the 23d of September, being for the cargo on their account by the Charlotte, and desiring them to insure the cotton. On the 19th of October Menlove & Co. sent an abstract invoice of the cotton, dated the 13th of October, in which it was stated that the cotton was shipped by Menlove & Co. on board the Charlotte, for Liverpool, "by order, and for account and risk, of Messrs. Barton, Irlam, & Co. there, and addressed to order." And on the 23d of October, Menlove & Co. sent to the bankrupts a full invoice of the cotton, dated the 13th of October, stating that the cotton was shipped for Liverpool "by order, and for account, of Messrs. Barton, Irlam, & Co. there, and to them consigned." It appeared that Menlove & Co., having no sufficient funds of the bankrupts in their hands to pay for the cotton, sold the bills they had drawn upon them to the bank at Charleston, and delivered to them the bill of lading, indorsed as before mentioned, as security for the due honor of the bills which, with the exception of one very small one, were dishonored by the bankrupts, and taken up by Menlove & Co.; and by letter of the 23d of October, Menlove & Co. informed the bankrupts that the bank to whom they had sold the bills required the delivery of the bill of lading to them, and that they had done so. On the 13th of November, Higginson & Co., the defendants, became bankrupts. The Charlotte arrived at Liverpool on the 26th of November; and on the 27th, notice was given to the master that Messrs. Menlove & Co. claimed to stop the cargo, and they required him to deliver it up to the bank at Liverpool, or their agent. The question is, whether Menlove & Co. could, under the circumstances, insist upon the delivery of the cargo of cotton to them or their agent, unless the bills were duly honored.

It was contended for the plaintiffs that the assignees, by the delivery of the goods on board the bankrupts' own ship specially

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

appointed for the purpose of bringing home those goods, and such delivery being made to the master, who was the bankrupts' agent for the purpose of receiving them, the absolute property vested in them, the sale being completed by the acceptance of the order and the terms of the invoice, and that the terms of the bill of lading, by which the goods were to be delivered at Liverpool "to order or to our (Menlove & Co.'s) assigns," did not prevent such absolute property vesting in the bankrupts, nor entitle Menlove & Co. as unpaid vendors to any right of stoppage *in transitu*, or any other right over them whatever, more especially as it was stated that no freight was to be paid for the cotton, "being owners' property," which was not consistent with the property remaining in Menlove & Co. It was also further contended, for the plaintiffs, that the captain had no power to bind the bankrupts by the special terms of the bill of lading, and that the delivery must be taken to be absolute to the vendees; and further, that if Menlove & Co. had any lien, the assignment of the bill of lading to the bank divested that lien, and deprived Menlove & Co. of all power over the goods. The cases mainly relied upon by them, in support of their principal point, were *Ogle v. Atkinson*, *Coxe v. Harden*, the *Case of the Constantia*, reported in Abott on Shipping, *Bohtlingk v. Inglis*, and *Fowler v. M'Taggart*, cited in it. All these cases, however, are clearly distinguishable from the present. In *Ogle v. Atkinson*, the general circumstances bore a close resemblance to the present. The vendor of the goods delivered them on board the ship of the vendee, which had been sent by him to receive them as the goods of the latter; but the vendor, wishing to preserve a control over them, prevailed upon the captain to sign a bill of lading, in which there was a blank for the name of the consignee, assuring him that it was of no consequence, as the goods were to be delivered to his owner; and the vendor then transmitted the bill of lading to a third person, who was to stop the delivery of the goods to the vendee, unless he accepted certain bills. But the court held that the vendee, under such circumstances, was entitled to the goods without accepting the bills, for the blank for the name of the consignee was either immaterial, as represented to the captain, or material as the vendor proposed to make it, and in that case a fraud was practised on the captain, which could not prevail against the consignee; and Lord Chief Justice Gibbs in his judgment says, "It is true, the goods might have been delivered on board the ship on the terms on which the defendant contends they were delivered;" and then he goes on to show that they were not so, by reason of the circumstances under which the captain was persuaded to sign the bill of lading with a blank for the name of the consignee.

This case, therefore, is clearly distinguishable from the present, but it is important as showing that a delivery on board the vendees' own ship, and to his own master, is not inconsistent with the vendors' annexing terms to the delivery, which may enable them to retain a right to claim them, and prevent any delivery, if the terms are not complied with. The case of *Coxe v. Harden* decided no more than this, that where goods are shipped on account of, and at the risk of,

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

the vendees, the property is vested in them, subject only to the consignors' right of stoppage *in transitu*, which right is gone unless exercised before the completion of the voyage and delivery into possession of the vendees. In the *Case of the Constantia*, also, it was held that, when orders have been received and executed, and delivery has been made to the master of the ship, and the bills of lading signed, the seller is *functus officio*, and has no right to vary the consignment, except in case of insolvency. Neither this case nor that of *Coxe v. Harden* are authorities for the point relied upon by the plaintiffs, that the delivery on board the ship of the bankrupts to their master was in effect a complete delivery to them, so as to vest the property absolutely, and deprive the vendors of the power of stopping the goods *in transitu*, or otherwise acquiring any right or control over them. The case of *Bohtlingk v. Inglis* was cited, upon the part of the plaintiffs, in support of their distinction between the case of goods loaded on board a general chartered ship where the owners of the ship are merely carriers and the master their servant, and that of goods loaded on board the vendee's own ship, the master of which is his servant; but neither that case, nor the case of *Fowler v. M^r Taggart*, cited in it, show more than this, that where the delivery of goods on board a ship is not for the purpose of conveying them to the consignee, but an absolute delivery to him, when put on board all power over the goods is lost to the vendor, and the relation of consignor and consignee no longer exists, and the property is absolutely vested in the vendee. Other cases were cited on the part of the assignees, to which it is not necessary to refer, as they do not appear to us to add materially to the effect of those to which we have already adverted.

On the part of the defendants, it was contended that Menlove & Co. had never parted with the property in the goods to the bankrupts, but had reserved their right to them until they were paid the purchase money, notwithstanding the terms of the invoice, and the statement in the bill of lading that no freight was payable for the cotton, it being "owners' property." We are of opinion, upon the facts of the case, that the learned judge was right in directing the verdict to be entered for the defendants on the trial, and that they now are entitled to our judgment. It appeared by the bill of exceptions that it was agreed on both sides at the trial that there was no question of fact for the jury, and that the judge should direct them how they should find their verdict; and he being of opinion, upon all the facts of the case, that Menlove & Co. had not delivered the cotton on board of the ship to be carried for, and on account, and at the risk of the vendees, but that they intended to preserve their right as unpaid vendors, he directed the verdict to be entered for the defendants. There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool to their order or their assigns, and that, therefore, was not a delivery of the cotton to the purchasers as owners, although there was a delivery on board their ship; the vendors still reserved to

Turner & others, Assignees, v. The Trustees of the Liverpool Docks.

themselves at the time of the delivery to the captain a *jus disponendi* of the goods which he, by signing the bill of lading, acknowledged, and without which, it may be assumed, the vendors would not have delivered them at all. The question really is, whether any, and what effect, is to be given to the terms in the bill of lading making the goods deliverable to the order of the vendors; for if, by those terms, they reserve to themselves a dominion over the cotton, it would not pass to the assignees. The invoice would pass no property, whatever its terms might be; the property would only pass upon the delivery, and the only effect to be attributed to the form of expression in the invoice or the bill of lading would be as indicating the terms on which the goods were delivered. The plaintiffs in error rely on the terms of the invoice, and the expression in the bill of lading, that the cotton is freight free, being owners' property, as showing the delivery on board the ship was with the intention to pass the property absolutely. But the operative terms of the bill of lading as to the delivery of the goods at Liverpool, and the letter of Menlove & Co. of the 23d of October, show too clearly for doubt that, notwithstanding the other terms of the bill of lading and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or of vesting the absolute property in the bankrupts. On this part of the case, the decisions of the Court of Exchequer, in *Van Casteel v. Booker* and *Wait v. Baker*, are authorities directly in favor of the defendants.

The plaintiffs further insisted that the captain had no power to bind the bankrupts by such terms in the bill of lading as would leave the property still in the control of the vendor, and yet engage that the cotton should be freight free. Whether, as the cotton was actually carried, the owner of the ship as such might not be entitled to freight on a *quantum meruit*, notwithstanding the terms of the bill of lading, is a point not necessary now to determine. But with respect to the question, whether the plaintiffs can set up a want of authority in the master so as to vest the property in the goods in the bankrupts immediately upon delivery, notwithstanding the special terms on which they were delivered, and the acceptance of the captain, we are clearly of opinion that it is not competent for them to do so; and that as Menlove & Co. delivered the bales of cotton on board on special terms, which the captain was not bound to accept, but without which they would not have delivered them, which would preserve to the defendants a control over them, the bankrupts cannot treat the delivery to the captain as a delivery to them, as their own property, when it was expressly agreed that they were not to be delivered to the bankrupts, but to the order of the vendors; and the want of authority of the master to accept them on such terms will not have the effect of vesting the property absolutely in the bankrupts. *Mitchel v. Ede* is a strong authority in favor of the defendants.

With respect to the question, whether the transfer of the bill of lading, by Menlove & Co., to the bank at Charleston, divested their power over the goods, we are of opinion that it did not. Menlove & Co. were the purchasers of the goods, and reserved to themselves, by

Cross v. Cheshire.

the terms on which they delivered them on board the ship, a property in the goods until payment was duly made. By indorsing and depositing the bill of lading in the bank at Charleston as security, they did not divest themselves of the property in the goods which they had reserved, and were in a situation to claim the goods as against the bankrupts by their agents at Liverpool. They never had divested themselves of the property in the goods or of the possession, except by delivery to the captain. This is not the case of delivery to a carrier for the purpose of his delivering them to the vendee, but a delivery to a carrier for the purpose of that carrier delivering them according to the order of the vendor, who retains more than a mere lien upon the goods. Neither the bankrupts nor the assignees ever had a property in the cotton as against the vendors, and an objection to their title may properly be taken under the plea of not possessed. It was said, as Menlove & Co. had funds of the bankrupts in their hands to some, although to a very small extent, they were not unpaid vendors to the full extent. But this really makes no difference, as no particular portion of the cotton was bought with these funds, and the bulk generally being purchased by Menlove & Co. with their own funds or credit, they retained a property in the whole of the goods until payment was made for the whole.

A question was made as to the admissibility of some of the evidence, but no matter of fact was left as a question for the jury; and we are of opinion that, independently of the evidence objected to, there was sufficient unobjectionable evidence to warrant the direction of the learned judge. It becomes immaterial to consider whether the evidence that was objected to was receivable or not. Our judgment, therefore, is for the defendants in error.

Judgment affirmed.

CROSS v. CHESHIRE.¹

Michaelmas Term, November 4, 1851.

Partners — Money paid — Affidavit in the Isle of Man.

A. & B. being partners, employed C. as their banker, who was also the private banker of B. A. having demanded of B. an explanation of a balance in the banker's hands against the firm, B. wrote him a letter, to say that that balance was his (the defendant's) own debt, and that the firm had nothing to do with it. Subsequent to this, B. gave the banker, for the balance, then reduced by some payments, a promissory note, signed with the name of the firm; and having afterwards become bankrupt, the banker sued A. on the note, and recovered:—

Held, that A. might sue B. for that amount in an action for money paid to his use.

Seemle, that an affidavit sworn before the deemster of the Isle of Man is not receivable here without proof that the deemster has power to take affidavits.

¹ 15 Jur. 993.

Cross v. Cheshire.

ASSUMPSIT for money paid to the use of the defendant, and on an account stated.

Plea — Non assumpsit.

At the trial, before Williams, J., it appeared that the plaintiff and defendant had been partners as salt manufacturers, a person of the name of Frith being banker to the firm as well as the private banker of the defendant. In December, 1846, the banker having demanded the balance of his account against the firm, the defendant, in answer to an inquiry made by the plaintiff, wrote a letter to him on the 19th of that month, saying that that balance arose from a debt of his (the defendant's) own, and that the firm had nothing to do with it. In October, 1847, the defendant gave Frith for that balance, then reduced by payments to 268*l.* 2*s.* 3*d.*, a promissory note, signed with the name of the firm, "Cross & Cheshire." This note was dishonored, and the defendant having become bankrupt, Frith sued the plaintiff on the note and recovered its amount, who now brought this action to recover that sum from the defendant as money paid to his use. The judge directed the jury that the plaintiff was entitled under these circumstances to maintain this form of action, and they found a verdict in his favor.

T. Jones moved for a new trial. The judge misdirected the jury. The plaintiff and defendant being partners at the time when this note was given, no action can be maintained by either of them on it against the other, for the law will not imply a promise by an offending partner to his companion. The plaintiff's remedy is by a bill in equity for an account and dissolution of the partnership, or possibly by an action against the defendant for improperly using the name of the firm.

[*Pollock, C. B.* If a person who owes a debt to A. B. by any contrivance causes C. D. to pay it, the action for money paid will lie to recover back the amount, and the machinery by which the mischief was brought about is utterly immaterial.]

Ex parte Yonge, 3 V. & B. 31, is an authority that the plaintiff's remedy is in equity, and the observations of Lord Eldon in that case seem to show that it is his only remedy.

[*Parke, B.* In that case, the claims of the parties could not be adjusted without taking an account. Here the defendant, by the admission in his letter, has rendered that unnecessary.]

The defendant has cancelled that admission by subsequently giving this note; besides, he states no account of any specific sum, and only acknowledges to a general balance. If the plaintiff is allowed to recover in this case, actions will be brought in every case where a partner exceeds the terms of the partnership contract. He likewise moved on the ground of surprise; and produced several affidavits, one of which purported to be sworn before the deemster of the Isle of Man, at Douglas, in that island, accompanied by the affidavit of a person at Liverpool that the party taking it was deemster.

Cross v. Cheshire.

POLLOCK, C. B. I am of opinion that there ought to be no rule in this case. As to the supposed misdirection, the judge has correctly laid down the law to the jury. I apprehend it to be quite clear that, where one man has been compelled to pay the debt of another, he has in general a remedy to recover it back in an action for money paid; and the method by which the mischievous effect has been produced cannot deprive the party of his remedy. Consequently, if one partner has cheated another through the intervention of a note accepted in the name of the firm, that other is entitled to recover against him, as for money paid to his use, the sum paid in satisfaction of an apparent debt of his own created by a fraud on the partnership. It is admitted that this note, though drawn in the partnership name, was in reality drawn for the defendant's private debt, and the jury must be taken to have so found; and if this be so, it appears to me very clear that the action for money paid will lie in this case. I think the case of *Ex parte Yonge* has nothing to do with the present. Lord Eldon there decided that two partners out of three might prove against the estate of the third in respect of moneys fraudulently taken from the firm. But that does not at all impeach the ruling of the judge here, that if there be only two partners, and one of them procures a debt of his own to be paid by the other out of his own pocket, that other shall not have his common-law remedy of *assumpsit* for money paid. There has, therefore, been no misdirection in this case; and as to surprise, I do not think that has been made out by the affidavits.

PARKE, B. The application for a new trial in this case is made on two grounds — misdirection and surprise. With respect to misdirection, I think on the facts of the case as they appeared at the trial, particularly after the letter of the 19th of December, 1846, that the judge correctly told the jury that the plaintiff was entitled to recover. The effect of that letter was to take this balance entirely out of the partnership accounts; it is equivalent to an admission by the defendant that the sum advanced by the banker was his own private debt, and not that of the partnership. After that letter, which in truth takes the case out of the partnership transactions, the case is simply this — that the defendant has made a false use of the partnership name to obtain payment of his private debt, and, consequently, the plaintiff has a right to sue him as for money paid to his use. I agree with my lord, that *Ex parte Yonge* has no bearing on this case. No account was there stated by the bankrupt, Slaney, in which he confessed himself bound to pay the amount, but the petitioners proceeded on the ground that he had abstracted too much money by fraudulently augmenting the partnership debts which the petitioners would ultimately have to pay. Lord Eldon there said, that on a commission of bankruptcy, which has a jurisdiction both at law and in equity, if it appears that some of the partners of a firm have, in consequence of the misconduct of their copartner, paid what they ought not to have been called on to pay, and for which payment they would have their remedy against him by bill in equity, that

Davies v. Edwards.

payment may be considered as a debt between him and them, and, consequently, that they are entitled to prove it against his estate. I put the present case entirely on the ground that the defendant, by his letter of the 19th of December, 1846, has admitted that this is a matter which was not to go into the partnership account at all. The defendant having, in the promissory note which he gave to the banker, improperly used the name of Cross & Cheshire, in consequence of which the plaintiff was compelled to pay that note as being his own debt, he may recover in this action; and this verdict is therefore right, unless it can be impeached on the ground of surprise. I think in strictness we ought to reject the affidavit which purports to be sworn in the Isle of Man, as not being in compliance with the terms required by the practice of the courts. The master has directed my attention to the rule on this subject; which is, that, in the case of foreign affidavits, the authority of the person administering the oath must be shown either by affidavit or a notarial certificate. *Re Worsley*, 2 H. Bl. 275.¹ The case of the Irish and Scotch judges is different, for they have power to administer an oath. [His lordship then proceeded to say that he entertained some doubt as to whether, under the circumstances of the case, a new trial ought not to be granted on the ground of surprise, but that the rest of the court were of opinion that the rule ought to be refused.]

ALDERSON and PLATT, BB., concurred.

Rule refused.

DAVIES v. EDWARDS.²

Michaelmas Term, November 4, 1851.

*Statute of Limitations — 9 Geo. 4, c. 14 — Part Payment —
Insolvency.*

One of the three makers of a joint and separate promissory note, bearing interest, paid the interest for some years, and then took the benefit of the Insolvent Debtors Act, having previously inserted the note in his schedule as an existing debt:—

Held, that a subsequent payment, on account of the note made by the assignee of the insolvent, under the direction of the Insolvent Debtors Court, was insufficient to take the case out of the Statute of Limitations, 9 Geo. 4, c. 14, as against the other makers.

THIS was an action brought against two defendants, by the executors of H. J., to recover a balance of principal and interest on a promissory note of the deceased for 37*l.*; to which the only material

¹ On the subject of affidavits sworn abroad, see *Walrond v. Van Moses*, 8 Mod. 323; *Re Worsley*, 2 H. Bl. 275; *Dalmer v. Bernard*, 7 T. R. 251; *Omealy v. Newell*, 8 East, 364; *French v. Bellew*, 1 Mau. & S. 302; *Watson v. Williamson*, 1 Dowl. 607; *Re Barber*, 4 Dowl. 640; *Ellis v. Sindair*, 3 Y. & J. 273; and *Ex parte Hutchinson*, 5 Dowl. & L. 523. *Quære*, whether this is affected by the new Law of Evidence Act, 14 & 15 Vict. c. 99, s. 7, 11.

² 15 Jur. 1014.

Davies v. Edwards.

plea was the Statute of Limitations. At the trial, before the lord chief baron, it appeared that the note in question was a joint and several promissory note given by the defendants and a person of the name of Marsden, and dated the 13th of January, 1840. Marsden paid the interest on this note as it became due until the year 1844, when he took the benefit of the Insolvent Debtors Act, having inserted the note in his schedule as a debt, in which he likewise stated its consideration to have been money borrowed. In November, 1848, a further sum of 2*l.* 3*s.* 11*d.* on account of this note was paid by order of the Insolvent Debtors Court, as a dividend on the estate of Marsden. The judge, deeming this evidence insufficient to take the case out of the Statute of Limitations, nonsuited the plaintiff, reserving him leave to move to enter a verdict for the amount claimed.

Edwards moved accordingly. Payment by the Insolvent Debtors Court of a debt which an insolvent has inserted in his schedule is virtually a payment by the insolvent, for by taking the benefit of the act he constitutes that court his agent to make payment for him, and the case is analogous to that of a man assigning his property to trustees, in order that they may distribute it among his creditors. The cases on this subject are collected in 1 Smith's L. C. 319. In *Jackson v. Fairbank*, 2 H. Bl. 340, where one of the makers of a joint and several promissory note became bankrupt, proof of the payment of dividends under the commission was held to take the case out of the Statute of Limitations as against the other maker; and that case was recognized and confirmed in *Brandram v. Wharton*, 1 B. & Ad. 463.

[*Parke, B.* Under the old Statute of Limitations, part payment was nothing unless accompanied by a promise to pay the residue; and the stat. 9 Geo. 4, c. 14, which enacts that verbal promises shall not be sufficient to take cases out of the former statute, leaves part payment as it was before. How is it possible to say that a dividend paid by the assignee of a bankrupt or insolvent, even taking him, as you contend, to be the agent of the bankrupt or insolvent for that purpose, amounts to a promise to pay the remainder?

Alderson, B. A part payment by one joint contractor makes both jointly liable for the residue. Here a man pays on condition that he is never again to be liable at law for the residue, and you want to make that payment good against his companion.]

A discharge under the Insolvent Debtors Act does not extinguish the debt, even as against the insolvent; for he thereby renders all his property, present and future, liable for it, and he remains liable even personally for debts not inserted in his schedule. Any payment, therefore, made by the court or assignee in his name, on account of a given debt, is an implied admission that the rest is due and will be paid if possible. And although the effect of the Insolvent Debtors Act is to free the insolvent from personal liability for the debts entered in his schedule, the statute expressly saves the rights of his creditors against third parties. It is true, indeed, that a part payment

Davies v. Edwards.

by the surviving maker of a joint and several promissory note will not take the case out of the Statute of Limitations as against the executor of his companion; *Atkins v. Tredgold*, 2 B. & Cr. 23; but the reason of that is, that the debt was severed by the death, so that the executor is not in the character of joint contractor with the survivor, and, consequently, cannot be affected by his acknowledgment.

PARKE, B. I am of opinion that no rule ought to be granted in this case, and that the judge at *nisi prius* was right in nonsuiting the plaintiff. The last Statute of Limitations applicable to this class of cases is the 9 Geo. 4, c. 14, which makes a promise in writing requisite to take a case out of the operation of the statutes on this subject, but which enactment is followed by a proviso that nothing therein contained "shall alter or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever." The question is, whether there has been such a payment in the present case as will take it out of the Statute of Limitations in respect to the plaintiff. This subject was not so much considered at the time when *Jackson v. Fairbank* and the subsequent case in the Queen's Bench of *Brandram v. Wharton* were decided, as it has been since. It has more recently undergone much consideration, and the principle has been laid down in this court, that a part payment, in order to be sufficient to take a case out of the statute, must be made on account of a sum admitted to be due, accompanied by a promise to pay the remainder. The first case establishing that principle is *Tippets v. Heane*, 1 C. M. & R. 252, which was decided in 1834, where I delivered the judgment. The question there was, whether a sum of money, proved to have been paid to the plaintiff, on what account did not appear, was sufficient to take the case out of the Statute of Limitations. I am there reported, I dare say correctly, to have said, "In order to take a case out of the Statute of Limitations by a part payment, it must appear in the first place that the payment was made on account of the debt. Secondly, it must appear that it was made on account of the debt for which the action is brought. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." The same rule was laid down by Lord Abinger in 1840, in his judgment in a case of *Waugh v. Cope*, 6 M. & W. 824, and afterwards in 1847, in *Wainman v. Kynman*, 1 Exch. 118; where it was held that a part payment of a debt would not take a case out of the Statute of Limitations, unless there were also a promise in writing to pay the remainder.¹ If this doctrine is appli-

¹ In *Willis v. Newham*, 3 Y. & J. 519, it was held, that a verbal acknowledgment of a payment of part of a debt, within six years, is not sufficient, within the 6 Geo. 4, c. 14, to take the case out of the Statute of Limitations; but this has been recently overruled in *Cleape v. Jones*, 15 Jur. 515; s. c. 4 Eng. Rep. 514.

Hibblethwaite v. The Leeds and Thirsk Railway Company.

cable to a payment made by the party himself, it is impossible to contend that a payment by the assignees of a bankrupt or insolvent involves a promise by him to pay the remainder of the debt, so as to enable the creditor to sue him for it after the expiration of the six years. If payment of this dividend would not have the effect of taking the case out of the statute, supposing it had been made by the party himself, *a fortiori* it cannot have that effect when not made by the party or his agent, but by a third party, namely, an assignee appointed to distribute his effects. There has, therefore, been no part payment in this case sufficient to take it out of the statute; for the only one proved is one by a third party to the promissory note, under circumstances which show it is not binding either as against himself or the other makers.

ALDERSON, B. I do not conceive how payment by the assignee has any thing to do with an acknowledgment of liability in the insolvent. The assignee is employed by law to distribute the estate of the insolvent among such persons as in his judgment, confirmed by that of the court, are entitled to it.

POLLOCK, C. B., and PLATT, B., concurred.

Rule refused.

HIBBLETHWAITE v. THE LEEDS AND THIRSK RAILWAY COMPANY.¹

Michaelmas Term, November 11, 1851.

Practice — Change of Defendant's Name — Affidavit.

F. ELLIS moved for judgment as in case of a nonsuit. He mentioned that, after issue joined, the name of the defendant company had been changed by act of Parliament; and a doubt having thereupon arisen as to how the affidavit for this motion should be entitled, two had been provided—one entitled in the old name, and one in the new.

The court, after consulting the master, said that the proper course was, either to entitle the affidavit in the original name of the cause, or enter a suggestion of the new name, and then entitle the affidavit in it. The latter was the more correct; but, at all events, affidavits in the two names could not be received; and Parke, B., observed, that the case was analogous to that of a party having his name changed by royal license during the progress of a suit.

Ellis then withdrew his motion, with the view of applying at chambers for leave to enter a suggestion.

¹ 15 Jur. 1015.

Bluck v. Gompertz.

BLUCK v. GOMPERTZ.¹

Michaelmas Term, November 15, 1851.

Evidence Act, 14 & 15 Vict. c. 99, s. 6 — Inspection and Copy of Documents.

The 14 & 15 Vict. c. 99, s. 6, which empowers courts of common law to order inspection and copy of documents in possession of the opposite party in all cases where a discovery may be obtained in a court of equity at the instance of the party applying, has not taken away the jurisdiction possessed by those courts previous to that statute, to order the inspection and copy of documents in the hands of an adverse party.

Where a plaintiff declared on a guaranty contained in a letter of the defendant, who swore that he never had a copy of it, that he verily believed that, if produced, it would establish his defence to the action, and that he was advised and believed it was necessary for his attorney to be informed of its true purport and effect, in order to prepare his defence :—

Held, that the defendant was entitled to an inspection and copy of this document, irrespective of the stat. 14 & 15 Vict. c. 99, s. 6.

LUSH had obtained a rule, calling on the plaintiff to allow the defendant or his attorney to inspect and take copy of the two bills of exchange mentioned in the declaration in this cause, and also of a letter or memorandum in writing of the 19th of March, 1851, written by the defendant and addressed to the plaintiff. The declaration stated that one M. C., by the defendant as his agent, had bargained and agreed with the plaintiff to purchase from him certain hogsheads of wine, for the sums of 200*l.* and 150*l.*, and "thereupon, in consideration that the plaintiff, at the request of the defendant, would at his own costs obtain two papers respectively stamped with a stamp denoting the payment for the use of her majesty of the duty payable by law in respect of the bills of exchange to be made thereon, and would on the said papers respectively make his two bills of exchange in writing, and direct the same to the said M. C., and thereby respectively require him six months after the date thereof respectively to pay to the plaintiff the said prices or sums respectively, and would deliver the said bills of exchange to the defendant, the defendant promised the plaintiff to get the said bills of exchange accepted by the said M. C., and to see that they were duly paid." It then averred that the plaintiff obtained the stamped papers, made and directed the bills of exchange to M. C., &c., and delivered them to the defendant; and alleged as a breach, that although the defendant got the bills accepted by M. C., and although the bills were duly presented to M. C. for payment, who did not pay them or either of them, of which the defendant had notice, &c., yet the defendant disregarded his promise, and did not see that the bills were paid, &c. The present application was founded on the 6th section of the 14 & 15 Vict. c. 99, "To amend the Law of Evidence," which enacts that "whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of common law at Westminster or Dublin, or the Court of Common Pleas for the County Palatine of Lan-

¹ 15 Jur. 1040.

Bluck v. Gompertz.

caster, or the Court of Pleas for the county of Durham, such court and each of the judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which, previous to the passing of this act, a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party so making application as aforesaid to the said court or judge." The rule was granted on an affidavit of the defendant, which, after setting forth the nature of the action, proceeded thus: "And this deponent says that the said two bills are in the custody or control of the plaintiff, as deponent verily believes; that the plaintiff has also in his custody or control a certain letter or memorandum in writing written by the deponent and addressed to the plaintiff, bearing date on or about the 19th of March, 1851, and which this deponent verily believes relates to the said bills, the receipt whereof the plaintiff has acknowledged in writing upon the said letter or memorandum, but in what precise terms this deponent is unable to set forth; that this deponent has not, nor ever had, any copy of the said letter or memorandum; that this deponent verily believes that the same is not to the purport or effect, nor does it express the consideration, alleged in the declaration, but that the same, if produced on the trial of this cause, would tend to establish this deponent's defence to this action; that this deponent is advised and believes that it is necessary for this deponent's attorney to be informed of the true purport and effect of the said letter or memorandum in order to prepare this deponent's defence to this action." This case had been before Martin, B., at chambers, who refused to make any order.

Welsby showed cause. There is no objection to this application, so far as relates to the bills of exchange mentioned in the declaration; but the defendant has no right to inspection or copy of the letter or memorandum of the 19th of March, 1851. The language of the 6th section of the 14 & 15 Vict. c. 99, is express, that inspection and copy of documents under that section is to be granted in those cases only "in which, previous to the passing of this act, a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity at the instance of the party."

Now, a court of equity would not interfere in a case like the present; for it is an established principle in those courts, that a party is entitled to a discovery of such documents only as tend to support his own title, and not of such as would merely enable him to pick flaws in that of his adversary. In *Bolton v. The Corporation of Liverpool*, 1 My. & K. 88, Lord Brongham says, "I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his

Black v. Gompertz.

adversary's. . . . The plaintiff here does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claim of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title; they are the corporation's title, and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, 'Prove me liable if you can.' The corporation have certain documents, which, they say, prove their liability. He cannot call for these documents, merely because they may, on inspection, be found not to prove his liability, and so help him and hurt his adversary whose title they are." And the lord chancellor there held, affirming the decision of the vice chancellor, 3 Sim. 467, that the defendant, in an action brought by a corporation for dues, was not entitled to an inspection of certain documents which the corporation admitted that they had in their custody and possession, and which consisted of certain cases which had been laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds which were the title deeds and documents evidencing their title to the dues in question. This view is supported by *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66, *Combe v. The City of London*, 4 Y. & C. 139, and other cases collected in Pollock on the Production of Documents for Inspection.¹ So the defendant here does not deny the existence of the document, or allege himself ignorant of its purport, or seek to impeach it as fraudulent; but requires inspection solely to see if it is in compliance with the Statute of Frauds, or open to any technical objection.

[*Pollock*, C. B. Why should he not find a defect in it if he can? If he finds it all regular, perhaps he will pay the plaintiff's demand.

Parke, B. Has not the defendant a right to inspect this document independent of the statute altogether? It has long been the ordinary practice of courts of law to grant inspection of any instrument on which a plaintiff seeks to charge the defendant as party, where only one part of the instrument has been executed, and the party holding it is, consequently, trustee for both. The case of *Blogg v. Kent*, 6 Bing. 615, is an express authority for this.² The courts were formerly more strict, and a distinction was taken by Mr. Baron Bayley with respect to bills of exchange which I never could understand, and has been abandoned in later times. Now, the letter of the 19th of March, 1851, is the very foundation of the present action, and, irrespective of this statute, I should not have had the least scruple

¹ A Treatise on the Power of the Courts of Common Law to compel the Production of Documents for Inspection; with an Appendix, containing the Act to amend the Law of Evidence, 14 & 15 Vict. c. 99. By Charles Edward Pollock, Esq., of the Inner Temple. London, 1851.

² See further on this subject, *Charnock v. Lumley*, 5 Scott, 438; 2 Jur. 96; and *Steadman v. Arden*, 15 M. & W. 587; 10 Jur. 553.

Black v. Gomperts.

about ordering an inspection of it. It would be most unjust to compel a defendant to go to trial on speculation, not knowing whether he was bound to the plaintiff or not.

Alderson, B. I have made hundreds of orders like the present. If it be true that this document could not be got by application to a court of equity, the consequence of your argument will be, that this statute, which was passed with the view of facilitating the discovery of documents, will have the effect of rendering us less liberal in granting it than we were before.]

The defendant has no *joint* interest in this letter; besides which, the present application is founded solely on the statute.

[*Parke, B.* It may be a question whether our ancient practice at chambers was not founded on a presumption that, in the cases to which it applied, the party could have relief in equity. The rule originally laid down by Lord Mansfield was, that whenever a party was entitled in equity to the inspection of documents, he should have it at law. See *Barry v. Alexander*, 4 Dougl. 15. In that he was wrong.

Pollock, C. B. Is there any case in equity where it has been decided that a defendant is not entitled to see a document to which he is himself party, and which forms the very foundation of the plaintiff's claim?]

Perhaps not; but that may arise from the peculiar system of pleading which prevails in courts of equity.

[*Pollock, C. B.* In *Combe v. The City of London*, Lord Abinger says, "Nothing can be plainer than the principles on which this right of production and discovery depends. Unhappily, each case presents a new application of those principles, on which there appears to be much more difference of opinion than I should have imagined to have existed. But let us see on what the principle does depend. A party has a right to compel the production of a document in which he has an equal interest, though not equal in degree, yet to a certain extent equal, with the party who detains it from him. In that case, he may file a bill of discovery, in order to have the possession of it, and the inspection of it. A party has also a right to file a bill of discovery for the purpose of obtaining such facts as may prove his case; and if those facts are either in possession of the other party, or, if they consist of documents in possession of the other party, in which he has either an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced, and he may file a bill of discovery, in order to aid him in law or in equity to exhibit those documents in evidence, or compel a statement of those facts."]

Lush, on rising to support his rule, was stopped by the court.

POLLOCK, C. B. There can be no doubt that, previous to the 14 & 15 Vict. c. 99, this court would have ordered an inspection and copy of this document. Then that statute gives us the same powers in this respect as are possessed by courts of equity. Now I, for one,

Smith v. Cartwright.

consider that a court of equity would do in this case as we should have done in it before the passing of the statute; so that, in making this rule absolute, we are right either way.

ALDERSON, B. In the case of *Inman v. Hodgson*, 1 Y. & J. 28, Lord Chief Baron Alexander says, "It would be a very formidable proposition to lay down that every party might look into documents in the possession of his adversary, without showing that he was interested therein." But that implies that he may look into them if he is interested. Here the person applying for the document is himself party to it.

Lush then said that he was provided with a series of cases in which courts of equity have compelled a discovery of documents where the avowed object of the party applying was to impeach them.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

SMITH v. CARTWRIGHT.¹

Trinity Vacation, June 21, 1851.

Custom to measure Coals — Right to weigh Coals by Statute — Coal-meter Officer not Servant of Corporation — Validity of Appointment not under Seal.

In a special action on the case, the declaration alleged that the corporation of L. had, from time immemorial up to the 1st of January, 1836, by persons deputed and appointed by them, the sole and exclusive privilege of measuring, and from the 1st of January, 1836, of weighing, all coals imported into the port of L. It then set out a like right, at the pleasure of the corporation, to fix and determine a reasonable rate of payment for the labor of the coal meters, to be proportioned previous to the said 1st of January, 1836, to the measured quantity of the coals, and subsequent to that day to their weight, the payments being to be made by the coal owner, and to be for the use and benefit of the coal meter. It then averred that the corporation had deputed and appointed a reasonable number of coal meters, of whom the plaintiff was one. The pleas traversed the right of the corporation to weigh the coals and the appointment of the plaintiff as a coal meter. Evidence was given of a custom of measuring all coals imported into the port of L. before the 1st of January, 1836, and that after that date the corporation ordered that the coal meters should be paid a sum per ton on the coals weighed instead of per chaldron as before, and that, subsequent to the 1st of January, 1836, the coal meters had weighed the coals instead of measuring them. In proof of the plaintiff's appointment, an entry in the corporation books, stating that he was appointed a coal meter, was put in. The entry was in the form always made respecting the appointment of coal meters. There was no evidence of any appointment of the plaintiff under the seal of the corporation. The plaintiff had acted as a coal meter for many years:—

Held, that the right of the corporation, by custom, by means of their deputies, to measure all coals imported into the port, was not converted into a right to weigh them by the stat. 5 & 6 Will. 4, c. 63:—

¹ 20 Law J. Rep. (N. S.) Exch. 401. Coram LORD CAMPBELL, C. J., PATTERSON, COLERIDGE, MAULE, CRESSWELL, and TALFOURD, JJ.

Smith v. Cartwright.

Held, also, that as the coal meter claimed fees for his own benefit by the custom, he was an officer, and not a mere servant, of the corporation; that the appointment, therefore, ought to have been under the seal of the corporation, no custom being alleged of appointing such an officer without deed.

THIS was an action on the case. The declaration stated that the corporation of King's Lynn, in Norfolk, from time whereof the memory of man is not to the contrary, "have been used and accustomed to have, and ought of right to have had, by the persons by them in that behalf from time to time deputed and appointed as hereinafter in this count is mentioned, the sole and exclusive work, labor, and privilege of measuring, and on and from the 1st of January, 1836, (being the day named and fixed in and by a certain act of Parliament, passed in the session of Parliament holden in the fifth and sixth years of the reign of his late majesty King William the Fourth, entitled, 'An Act to repeal an act of the fourth and fifth years of his present majesty relating to weights and measures, and to make other provisions instead thereof,' for the coming into operation of certain provisions of the said act,) hitherto and now of weighing, instead of measuring, all coals imported into the port of King's Lynn aforesaid by and the property of any person or persons then, to wit, at the time of such importation, resident within the said borough of King's Lynn, or by or the property of any other person or persons whatsoever, in any ship or vessel; and also the right and privilege of from time to time deputing and appointing to perform such work and labor a reasonable and sufficient number of fit and proper persons for that purpose, and of from time to time appointing a fit and proper person who should have authority over such last-mentioned persons; and of ordaining and constituting, from time to time, a certain order and rotation in which the said persons so from time to time deputed and appointed should and might be employed in performing such work and labor as aforesaid, as should from time to time be needed and required, and also from time to time, at the pleasure of the said mayor, aldermen, and burgesses, of fixing and of determining a reasonable rate and scale of payment for so much of such work and labor as aforesaid as should be required to be done in relation to any such coals so imported into the said port, by and being then the property of a person then resident in the said borough, and another and greater reasonable rate and scale of payment for so much of such work and labor as aforesaid as should be required to be done in relation to any such coals so imported into the port, and being then the property of, or then imported by, a person not being so then resident in the said borough; such respective rates and scales of payment to be proportioned previous to the 1st of January, 1836, hereinbefore mentioned, to the measured quantity, and on and subsequently to such last-mentioned day to the weight of the said coals; and such payments respectively to be made to such of the said persons so from time to time deputed and appointed as aforesaid, according to the order and rotation so ordained and constituted as aforesaid, and for the time being in force as ought to do and perform, and should actually do and perform, the said work and labor in

Smith v. Cartwright.

respect of which such payment should become due; and such payments respectively to be for the use and benefit of the person so receiving the same."

The declaration then averred a right and privilege of the corporation, that every owner of a vessel arriving in the port of Lynn with coals on board should give notice thereof to the corporation, in order that the work and labor before mentioned might be performed by the said meters, and by no other person whatsoever. It then averred that the corporation fixed the rate of payment at 3s. for every score of tons' weight of coals imported the property of a resident in the borough, and 4s. 5d. a score of tons' weight of coals not the property of a resident in the borough.

It then stated that the corporation deputed and appointed a reasonable and sufficient number of meters, of whom the plaintiff was one; that the defendant was the owner of a vessel, and a resident in the borough; that he caused to be imported five hundred tons' weight of coals, his own property, in his vessel; that the vessel arrived in port, having the coals on board; that the plaintiff was the coal meter in rotation; that though a reasonable time had elapsed, and though it was the duty of the defendant to give notice, the latter had not given such notice of the arrival of the vessel with the coals into the port, whereby and by reason of the defendant's having discharged, loaded, and carried away the coals, the plaintiff was prevented from weighing the coals and from earning and receiving a large sum of money.

There was a second count in the declaration.

The defendant pleaded various pleas.

The second plea to the first count alleged that the corporation of King's Lynn "have not been used and accustomed to have, nor ought of right to have had, by the persons in the said first count in that behalf mentioned, the sole and exclusive work, labor, and privilege of measuring and of weighing, instead of measuring, such coals as in the said first count in that behalf mentioned, imported into the port of King's Lynn aforesaid, as in that count in that behalf mentioned, in manner and form," &c.

The seventeenth plea was a similar plea to the second count.

The twelfth plea to the first count alleged that the plaintiff "was not one of the meters so deputed and appointed by the said mayor, aldermen, and burgesses as in the said first count mentioned," in manner and form, &c.

The twenty-third plea was a like plea to the third count.

The case was tried, before Pollock, C. B., on the 26th of March, 1849, at the Norfolk assizes. The plaintiff gave evidence of a custom of measuring all coals imported into the port of King's Lynn; that there always were coal meters in the borough, appointed by the corporation, and holding office during the pleasure of the corporation; that none but the appointed coal meters interfered with the measurement of the coals; that until the 1st of January, 1836, the coal meters received 2d. per chaldron for measuring the coals imported into the port and the property of residents; that, after the passing of

Smith v. Cartwright.

the act, the corporation ordered that the meterage of coals should be 1½*d.* per ton instead of 2*d.* per chaldron henceforth.

In support of the twelfth and twenty-third issues, the plaintiff put in evidence an entry from a book of minutes of the proceedings of the corporation, in the following words: "At a congregation held on the 9th of August, 1829, John Smith, [the plaintiff,] one of the extra coal meters, was appointed to the office of one of the corn and coal meters, in the place of James Overland, deceased, and the said John Smith took the usual oaths in this behalf." There were in the books other entries of appointments of coal meters of a like description. It was also proved that the plaintiff had regularly acted as a coal meter; that the defendant's vessel came into port loaded with coals while the plaintiff was the coal meter in rotation; that the defendant refused to have a coal meter, unless he would work for less than 1½*d.* a ton; that the defendant made no objection on the ground that the plaintiff was not duly appointed or that he was not the proper coal meter; that the defendant's coals, in consequence of his refusal, were not weighed; that the fees received by each coal meter belonged exclusively to himself.

The learned chief baron told the jury that the plaintiff had not given evidence of the exclusive right of the corporation to weigh, instead of to measure, the coals imported into the port; and directed a verdict for the defendant on the second and seventeenth issues. He also held that no evidence had been given of any appointment of the plaintiff which would confer on him the office of coal meter, and, in consequence, directed the jury to find for the defendant on the twelfth and twenty-third issues also. The jury found for the defendant.

A bill of exceptions was tendered to the ruling of the learned judge, and a writ of error brought.

The case was argued (May 20) by

Sir F. Kelly, for the plaintiff. The corporation has a right to fix the amount of payment to be paid to the coal meters for weighing the coals — a certain rate per ton. There was no necessity that any inquisition should be taken under sect. 14 of the 5 & 6 Will. 4, c. 63, as that section only applied when the amount of payment per chaldron was a fixed sum. *Goody v. Penny*, 9 Mee. & W. 687; s. c. 11 Law J. Rep. (n. s.) Exch. 289, is precisely in point, and shows that where there is a body that has a right to alter the amount of payment, they may of themselves calculate the amount at so much per ton, without resorting to the mode of proceeding by inquisition pointed out by the section. Then, by the custom, the corporation have the right of varying the payments to the coal meters within reasonable limits; and it is proved that after the passing of the act, and before the action commenced, they had fixed the amount at 3*s.* for every twenty tons weighed. Sect. 6 abolishes all selling of coals by measure.

[*Maule, J.* What is the object of weighing the coals? Is the custom a reasonable custom?]

Smith v. Cartwright.

Formerly it was necessary to measure them for the purpose of assessing duties upon them, which duties were assessed according to the report of the coal meter. It may be that some duty or toll may still be assessed in respect of the coals. It would follow from the general effect of the statute, without any express provision, that if the corporation had, before the act, a right of fixing the amount of payment according to measure, they could now have a right and a duty to assess the payment according to weight. The principle of the act substitutes weighing for measuring for all purposes.

[*Maule, J.* Does the act apply to this case? Suppose a duty payable to the corporation according to the space occupied by the coals, do you contend that the coals must now be weighed?]

As all duties on coals are now to be paid by weight, it would be necessary to weigh them now. It would be useless to measure them.

[*Parke, B.* Does this act apply to all coal leases, so as to alter the mode of ascertaining the royalties due to the landlord?]

Maule, J. If the rent was reserved payable in coals, the act would probably apply, but not so if rent was reserved payable in so many cubic feet of coal.]

In the case of *The Corporation of Rochester v. Lee*,¹ it was assumed on all sides that the act applied to the case of a coal meter. If the assumption be wrong, the charge of 4*d.* per ton on all coals imported into the port of Rochester is wholly unauthorized and void in law, as the claim by prescription was to a duty of 4*d.* per chaldron, not per ton. Secondly, there was ample proof of the plaintiff's appointment as a coal meter. There was evidence that he had acted as a coal meter for twenty years.

[*Lord Campbell, C. J.* That alone might have been good evidence, but that must be taken with reference to the entry in the corporation books.]

Those books showed that for many centuries there had been one uniform mode of appointment to this office, and that that mode had been duly and regularly followed in the present case. The plaintiff's appointment was in the form used from the earliest times. If his appointment be defective, no appointment of a coal meter has ever been good. Besides, the plaintiff is a public officer. The court, therefore, will presume his appointment regular from the fact of his acting.

[*Lord Campbell, C. J.* The meter of all coals imported into one of the queen's ports must, I think, be considered a public officer.]

A vestry clerk — *M'Gahey v. Alston*, 2 Mee. & W. 206; s. c. 6 Law J. Rep. (N. S.) Exch. 29; a master in chancery — *Marshall v. Lamb*, 5 Q. B. Rep. 115; s. c. 13 Law J. Rep. (N. S.) Q. B. 75; a constable of a town — *Butler v. Ford*, 1 Cr. & M. 662; s. c. 2 Law J. Rep. (N. S.) Exch. 286, have been held public officers, and proof of acting has been considered sufficient proof of the appointment. The cases are collected, 1 Taylor on Evidence, p. 112.

¹ Not yet reported.

Smith v. Cartwright.

[*Lord Campbell*, C. J. In cases where third persons are concerned, proof of the acting as a public officer may be sufficient; but does the principle extend to an instance where the officer is suing for his own benefit?]

There is no restriction of the principle in the case where the officer is concerned and interested. There is no instance in the corporation books of any appointment of a coal meter under seal. The immemorial usage makes valid the appointment, though not under seal. Unless an interest passes out of the corporation, an appointment under seal would be unnecessary. *Anon.*, 1 Salk. 191. *Smith v. The Birmingham Gas Company*, 1 Ad. & E. 526; s. c. 3 Law J. Rep. (N. S.) K. B. 165. The meter receives nothing from the corporation, but only a remuneration for his labor in weighing for the coal owner.

[*Lord Campbell*, C. J. What good does the weighing the coals do to the coal owner or any one?]

It is not necessary that all the purposes for which the weighing is useful should appear on the record. If the weighing be requisite for any purpose, the custom is a reasonable one.

[*Maule*, J. Ought not the declaration to have limited the custom to coals required to be weighed for some useful purpose.]

A corporation may appoint a servant, a cook, or a bailiff without instrument under seal. So they may a coal meter, who holds office only during pleasure. By custom in the city of London, many officers are appointed without seal.

Watson, for the defendant. The ruling of the chief baron was right on both points. There is no evidence in support of a custom to weigh all coals imported into the port of King's Lynn. A custom which requires a man to have his coals weighed for the sole purpose of giving a fee to the meter is unreasonable and bad. *Jenkins v. Harvey*, 2 Cr. M. & R. 393; s. c. 5 Law J. Rep. (N. S.) Exch. 17.

[*Lord Campbell*, C. J. We are not now considering whether the custom be reasonable, but whether there is any evidence to support it in fact.]

The declaration alleges a custom to charge one sum to residents and a larger sum to strangers. If the smaller sum be a reasonable remuneration to the coal meter, it follows that the larger charge is unreasonable. There is no evidence of a custom to weigh, but only of a custom to measure.

[*Coleridge*, J. Is not weighing a mode of measuring?]

"Weight" and "measure" are expressly used as distinct terms.

[*Cresswell*, J. If the statute applies to this case, it proves the declaration.]

The statute only applies to coals weighed for the purpose of sale. Sect. 9 substitutes weight for measure in such cases. Sect. 14 applies to the cases where tolls, rates, or duties are imposed in respect of coals. *Goody v. Penny* is not in point. There is nothing in the act to say that all persons who have an exclusive right of measuring coals shall henceforth have an exclusive right of weighing

 Smith v. Cartwright.

them. Secondly, there was no evidence of any appointment of the plaintiff as a meter. When the question arises incidentally in the course of a cause respecting a public officer, proof of his acting as such is sufficient *prima facie* evidence of his appointment, but there is no authority to show that that rule applies to cases where the appointment is directly traversed. The appointment to a corporate office, to be valid, must be under seal. There was no evidence of such an appointment. Nor is there here any room for presuming the existence of a deed, for all the facts relative to the appointment are before the court. *The King v. Verolst*, 3 Camp. 432. Here the entry in the corporation book was given in evidence as the appointment. There is a wide distinction between the appointment of an officer and a mere servant. Com. Dig. vol. 4, tit. "Franchise," F, 13. *Mayor of Ludlow v. Charlton*, 6 Mee. & W. 815. *Church v. The Imperial Gas-light and Coke Company*, 6 Ad. & E. 846; s. c. 7 Law J. Rep. (N. S.) Q. B. 118. *Paine v. The Strand Union*, 8 Q. B. Rep. 340; s. c. 15 Law J. Rep. (N. S.) Q. B. 211. On the appointment of a coal meter, an interest passes from the corporation.

Sir F. Kelly replied.

Cur. adv. vult.

Judgment was now delivered by

PATTERSON, J. The first question that we have to determine in this case is, whether the lord chief baron was right in directing the jury upon the second and seventeenth issues that the plaintiff had not given evidence of the right of the mayor, aldermen, and burgesses of the borough of King's Lynn to the sole and exclusive work, labor, and privilege of, on and since the 1st of January, 1836, weighing, instead of measuring, all coals imported into the port of King's Lynn as claimed in both counts of the declarations, and in directing the jury to find a verdict on those issues respectively for the defendant. The plaintiff alleging the immemorial custom for the corporation to measure all such coals till that day, admits that it is only under the stat. 5 & 6 Will. 4, s. 63, that the claim afterwards to weigh them can be supported; and it is quite clear that, without the authority of Parliament, a right to measure could not be converted into a right to weigh.

The plaintiff's counsel, in arguing that there was no necessity for an inquisition at Quarter Sessions, asserts that this case does not come within the 14th section of the statute, there not being a fixed sum payable for measuring the coals at Lynn. They, therefore, renounce all benefit from that section, and they can only seek to avail themselves of the 9th section, which enacts that after the 1st of January, 1836, coals shall be sold by weight, and not by measure. But, looking to the very singular right claimed on this record, we cannot see how the exercise of it is at all affected by the statute. It is not a right to any toll, rate, or duty payable to the corporation, nor a rate at all connected with the sale of coals; no purpose is pointed out for which the measurement was made; and the only payment in

Smith v. Cartwright.

respect of it was a reasonable sum paid to the meter appointed by the corporation for his work and labor in measuring. There is no express enactment in the statute that, wherever coals had been theretofore of right measured, they should be thereafter weighed; and we think it contains nothing from which such an intention on the part of the legislature is to be implied. There are many purposes for which coals may still be lawfully measured, as to ascertain the amount of freight or warehouse room to be paid for them, which may be regulated by their volume and not their weight. Nothing appears why the corporation of Lynn might not have continued to ascertain the quantity of coals landed in their port by measurement as before; and we think they offered no evidence of a right in themselves, or persons deputed by them, to weigh coals against the will of the importer.

Goody v. Penny was an action of debt for rates and duties imposed by the local act of Parliament on coals landed within a certain district, and there was no doubt that the rates and duties were payable. The decision there, that an inquisition by the lessor was unnecessary, does not apply here, where a special action on the case is brought for preventing the plaintiff from weighing the defendant's coals, and no right to weigh them is established. So the case of *The Mayor of Rochester v. Lee*, referred to in the argument, has as little application, as that was an action of debt for the toll or port duties, payable to the corporation on the landing of coals within the port of Rochester, and the proportion between the chaldron and the ton, to regulate the payment, had been duly ascertained within the 14th section of the act of Parliament. On the first exception, we think the defendant in error is entitled to our judgment.

The second exception depends upon whether there was evidence to go to the jury to prove that the plaintiff was one of the meters deputed by the mayor, aldermen, and burgesses of Lynn, which is denied by the twelfth and twenty-third pleas. The objection is, that an appointment under the seal of the corporation was necessary. If it was not necessary, there was abundant evidence that would have justified the jury to have found for the plaintiff on those issues. It is material to look to see how the custom is alleged. The declaration claims a right in the corporation, (by the persons by them in that behalf from time to time deputed and appointed as hereinafter mentioned,) and afterwards states that the corporation had duly, in the exercise of their said right in that behalf, deputed and appointed certain meters, of whom the plaintiff was one. The declaration does not state any where how he was to be appointed, nor when he should be appointed. It does not state as part of the immemorial custom that the meters might be deputed and appointed without seal, nor any particular mode in which they should be appointed. Therefore, even supposing that a corporation by prescription might prescribe to do certain corporate acts without seal, which acts, by the general law, would require the use of a seal, which, however, we by no means intend to lay down as the law, still the custom must be so alleged, which it is not in the present instance. The corporation claim a right to measure by

Steiner v. Heald & others.

persons appointed by them; that alone would make the appointment merely that of a servant, and might well be without seal; but the payment in respect of the measurement is for the benefit of the meter only, the corporation takes no part of it. The meter is the plaintiff, and complains of being disturbed in the exercise of his privilege. This shows that the meter claims an office to which certain profits, to be fixed indeed from time to time by the corporation, are annexed, and he sues for the disturbance of his right to that office. If he had performed the duty, he must have claimed the prescribed fee as due to himself. Now, this right to discharge certain duties in regard to the property of third persons, (altogether against their will,) and demand payment for so doing, must be by reason of his having an office; and he is not a mere servant of the corporation, but an officer appointed by them. Therefore, he must have an appointment under seal; and we do not think that the tenure of his office, which is said to be during the pleasure of the corporation, can make it unnecessary that he should have such an appointment, or convert him from an officer into a mere servant. On this exception, therefore, as well as the other, we think the defendant entitled to succeed, and the judgment of the court below must be affirmed.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

STEINER v. HEALD & others.¹

Easter Vacation, May 20, 1851.

Patent — New Manufacture — Garancine — Fresh and spent Madder.

In the ordinary process of dyeing by means of madder, the coloring matter is obtained from fresh madder by the application of hot water. The refuse, after boiling, is called "spent madder." It had long been known to dyers that a portion of the coloring matter remained in the spent madder, but it was not known how to extract it, as it remained in combination with the plant. Recently it was discovered that, by means of acid and hot water, the pure coloring matter of madder, called "garancine," could be obtained from fresh madder, and that this process extracted all the coloring matter of the plant. The plaintiff obtained a patent for a new manufacture of garancine by applying the same process of acid and hot water to the spent madder. Since his invention the spent madder, which was previously worthless, became valuable:—

Held, in an action for an infringement of the plaintiff's patent, that it was not a question of law for the judge, but of fact for the jury, whether the plaintiff's invention was a new manufacture of garancine.

THIS was an action on the case for the infringement of a patent for the invention of a new manufacture of a certain coloring matter called "garancine."

¹ 20 Law J. Rep. (N. S.) Exch. 410. Coram PATTESON, MAULE, WIGHTMAN, ERLE WILLIAMS, and TALFOURD, JJ.

Steiner v. Heald & others.

The material pleas on which issue was joined were, first, not guilty; second, that the plaintiff was not the first inventor of the invention; third, that the invention was not new; fifth, that the invention was not for a manufacture for which a patent could be granted; sixth, that it was not a new manufacture.

At the trial, before Pollock, C. B., on the 30th of November, 1849, the following facts appeared: The ordinary process of dyeing calico by means of madder has been for a long time effected by reducing the madder, which is a foreign root, into a coarse powder, putting it into a dye bath, with a large quantity of water; into this the pieces of calico previously prepared with a mordant to fit them to receive the dye are placed, and then the temperature of the bath is gradually raised to boiling heat. The calico is then taken out completely dyed, and what remains in the water is termed "spent madder." It was formerly thrown away as useless, or occasionally used as manure; but its properties as manure, which were very slight, seemed to be due to the dung which formed part of the mordant of the calico remaining mixed with it. It was well known to manufacturers that after the boiling of the madder, and the extraction of a portion of the coloring matter from the plant, there remained in the spent madder additional coloring matter, contained part in the earthy bases and part in the fibre of the plant. Garancine was a well-known article before the plaintiff's patent was obtained. It is the pure red coloring matter of madder, and is of a brighter color than the ordinary madder dye. It had been for some time obtained from madder by means of the application of sulphuric acid and boiling water or steam to the fresh madder, which extracted all the coloring matter from the madder. The plaintiff's patent was for the application of the same above-mentioned chemical process of acid and hot water to the spent madder, and it was successful in extracting garancine from that substance. No one had previously extracted garancine from spent madder. Since the plaintiff's patent, the spent madder had become very valuable.

The counsel for the plaintiff contended, on these facts, that it was a question for the jury whether the making the garancine in the manner described in the plaintiff's specification was a new manufacture; but the learned chief baron directed the jury to find a verdict for the defendant on the last two issues.

The case came before the court on a bill of exceptions, which was tendered to the direction of the learned judge, and was argued (February 6 and May 16) by

Watson, for the plaintiff. The ruling of the learned chief baron was wrong. The patent, in this case, was for making garancine from spent or refuse madder. No doubt garancine was an article used before, and it was made by means of hot water and sulphuric acid applied to fresh madder; but the plaintiff makes garancine by means of hot water and sulphuric acid applied to refuse or spent madder, which before was useless, except for manure. A patent may be granted for such a new combination, which is a manufacture within the meaning of the statute. This is an economical and beneficial

Steiner v. Heald & others.

invention. Now, from the same material, fresh madder, madder dye, and garancine can be both obtained; whereas previously, if it was wished to obtain garancine from madder, it was not possible to obtain madder dye from the same madder. *Darcy v. Allin*, Noy, 178; s. c. Webster, P. C. 6, lays down the principle on which patents may be granted. *Crane v. Price*, 4 Man. & G. 580; s. c. Webster, P. C. 377; 12 Law J. Rep. (N. S.) C. P. 81, shows that a new combination of two well-known processes to produce a well-known article is a ground for a patent. In that case, a patent was granted for a process of smelting iron by burning anthracite coal by means of a hot blast. The burning anthracite coal was known before — the hot blast was used before; but they had never been used together.

[*Maule, J.* The point on which you will be pressed here is, that you use the same process to obtain the garancine from refuse madder as was formerly used to produce the same article from fresh madder.]

It has been expressly decided that if a party discovers that by substituting one element for another, in an old combination, he can produce a well-known article cheaper and better than before, he may be entitled to a patent for the invention. *Cornish v. Keen*, 1 Webster, P. C. 517, shows that a patent for a new arrangement of the same elements which have been used in a combination together before is good. (The court then called on the counsel for the defendants in error.)

Cleasby, for the defendants. This is no invention at all. It is merely an application of an old process in a well-known manner, and to a well-known substance. It is found that the coloring matter in madder is partly free and soluble in water, and partly held in chemical combination with earthy and fibrous substances. The known process of getting madder is to steep it in hot water, and then the part of the coloring matter that is chemically combined is left; but where garancine is got from the fresh madder by the hot water and acid, all the coloring matter is extracted; that is, the free coloring madder is extracted by the hot water, and that portion which is chemically combined is drawn out by the aid of the acid. No doubt the mode of extracting the coloring matter by means of hot water from fresh madder might have been made the subject of a patent. If a patent had been taken out for that process, the plaintiff could not have taken out the present patent and sued the original patentee for infringing his patent. There is no substantial difference between applying the process to fresh madder and to madder once steeped. It is a fallacy to say that the process is applied to a new material: spent madder is not a new substance; it remains madder still. Madder is to be considered for the purpose of this question with reference to its coloring qualities. Probably no two pieces of madder contain the same quantity of coloring matter. If an inferior kind of madder were brought from a different country, it would possibly be similar in coloring qualities to the spent madder, which is only an inferior description of madder containing a smaller quantity of coloring matter. It being known that the whole coloring matter could be got out of madder by

Steiner v. Heald & others.

the process, it is obvious that it was perfectly well known that all the coloring matter could be got out of spent madder by the same process. The statute which allows the granting of a patent permits the monopoly to be granted for "any manner of new manufacture to the true and first inventor." *Darcy v. Allin* shows that there must be some new invention. It is not enough that its precise application may not have taken place before, when it is known before that such an application would produce the known result.

[*Talfourd, J.* The plaintiff found out that the process, which was applicable to the whole, might be applied to a part.]

A person cannot take out a patent for simply applying a known process to a new but similar substance for a similar purpose. Suppose a person has obtained a patent for the process for making iron nails, and it is afterwards found advantageous to apply it to copper, no one individual could take out a patent, and appropriate to himself the application of the process of making copper nails. In *Brunton v. Hawkes*, 4 B. & Ald. 541, the patent failed from absence of invention, although the patentee's mode of making anchors out of two pieces of iron, instead of three, had never been used before.

[*Patteson, J.* Can you maintain the proposition that if a party discovered that, by applying to potatoes the process used for obtaining garancine from madder, he could obtain a valuable coloring matter, that he could not obtain a patent for it?]

There there would be a discovery of a new quality in the potato; but here the property of the spent madder was well known. *Kay v. Marshall*, 5 Bing. N. C. 494; s. c. 1 Beav. 535, is directly in point. That case shows that a party cannot appropriate to himself the mode of spinning flax at a short reach, because the process of spinning at a short reach had been known as applicable to textile fibres in general, although it had never been applied to flax before, and it had only become advantageous to apply it in consequence of another discovery of the plaintiff in that case in the preparation of the flax.

[*Maule, J.* Had the patentee there claimed the patent for the maceration of the flax and the spinning at short reach, he might have obtained a patent for the combination.]

It cannot fairly be said that the plaintiff discovered the applicability of the process to the spent madder, except it be supposed, and that without evidence, that spent madder has a different chemical construction from fresh madder. If the mode of application be new a patent may be granted, but not otherwise. *Saunders v. Aston*, 3 B. & Ad. 881; s. c. 1 Law J. Rep. (n. s.) K. B. 265. *Crane v. Price*, relied on by the other side, is distinguishable; the patent in that case was for producing a new substance.

Watson, in reply. The plaintiff's patent is in effect for the invention of getting garancine from a new subject matter. It is a fallacy to say that the spent or refuse madder is the same substance as fresh madder. The material from which this garancine is extracted by the plaintiff's patent would more properly be called refuse of the dye vat. It is not madder only. There is dung and other substances united

Steiner v. Heald & others.

with madder. A new chemical combination may have been formed. There is no precise analysis given of the article called "spent and refuse madder." If the case does not clearly show that it is a different substance from fresh madder, it was, at least, a question for the jury whether it was the same or different. If so, the plaintiff in error is entitled to a *venire de novo*. It was long known that there was coloring matter in the spent madder, but no one knew how to extract it. The plaintiff is the first person who has succeeded in doing so. The invention, therefore, is new. The evidence stated in the bill of exceptions shows that the invention is most useful. The analogy between patents for mechanical inventions and those for chemical discoveries is very slight. Of the properties and qualities of chemical substances little can be predicated prior to experience, but the properties and effects of mechanical contrivances can be calculated precisely beforehand. The case of *Brunton v. Hawkes* does not bear on the case. It turned entirely upon the question of the novelty of the invention, not on what may be the subject of a patent. He referred to Walton's patent. Webster on Patents, 585, 591.

Cur. adv. vult.

The judgment of the court was now delivered by

PATTESON, J. We are all of opinion in this case that there must be a *venire de novo*. The issues in question were, whether the invention of the plaintiff was a manner of manufacture for which letters patent could lawfully be granted, and whether it was a new manufacture of garancine. The learned judge told the jury that if they believed the evidence they must find these issues for the defendants, thereby treating the conclusion to be drawn from that evidence as matter of law, whereas the counsel for the plaintiff contended that the issues should be left to the jury as a question of fact, thereby treating the conclusion to be drawn from the evidence as matter of fact, or, at all events, as mixed matter of fact and law. It appeared in evidence that the common mode of using madder for dyeing was by grinding it into powder and putting it into the dye bath with the cloth and other things, to make the cloth take up the coloring matter; when the cloth was taken out of the bath there remained a substance which was called "spent madder;" it was known to dyers that this spent madder still contained coloring matter, but no mode of making use of it for dyeing purposes was known before the plaintiff's patent. Attempts were made to use it for manure, but they appear to have failed, and spent madder was always thrown away as useless. Subsequently, it was discovered that by the application of heat and acid to fresh madder the whole coloring matter would be extracted, and when so extracted it formed a substance called "garancine," and this process was known and commonly used. Afterwards the plaintiff discovered that, by the same process of heat and acid, garancine could be extracted from spent madder as well as from fresh madder. There is here no new contrivance, for the process used under the plaintiff's patent with the spent madder is the same

Symons v. May.

as that previously used with fresh madder; neither is the product new, for garancine produced from the one and the other appears to us precisely of the same quality. If, therefore, the patent be good, it must be on account of the old contrivance being applied to a new object under such circumstances as to support the patent. Now, spent madder might be a very different thing from fresh madder in its properties, chemical and otherwise, or it might be in effect the same thing as fresh madder in its properties, chemical and otherwise, with the difference only that part of its coloring matter had been already extracted; again, the properties, chemical and otherwise, of both might or might not have been known to chemists and other scientific persons, so that they could tell whether fresh madder and spent madder were different things, or, substantially, the same things. These points appear to us to be questions of fact, and material to affect the validity or invalidity of the patent, and to be questions of fact to be found by the jury by way of inference or conclusion of fact from the evidence adduced on the trial. We think, therefore, that the learned judge was wrong in treating the conclusion to be drawn from the evidence as matter of law; and that the exception is well pointed as treating it as matter of fact which should have been left to the jury, with such observations, of course, as the learned judge might think proper to make for their assistance. There must, therefore, be a *venire de novo*.

Judgment reversed.

SYMONS v. MAY.¹

Trinity Vacation, June 17, 1851.

Insolvent Act, (India,) 11 Vict. c. 21, s. 6 — Schedule — Bills, Description of — Sufficiency of.

Bills of exchange, drawn by the defendant in India, were purchased there for the plaintiff, Moses Symons, who resided in England, and were indorsed and transmitted to him in this country. The defendant afterwards petitioned the Insolvent Court in India, and in his schedule described the plaintiff's debt thus: "Creditor, A. M. Symons, for the following bills of exchange (describing them) drawn by us upon Messrs. R., I., & Co., in favor of Moses Symons." A person named A. M. Symons resided in Calcutta, but was not shown to be connected with the bills in question:—

Held, that the description in the schedule was insufficient within the meaning of the 11 Vict. c. 21, s. 5, sched. C., the Insolvent Act, (India,) and, therefore, that the defendant was still liable on the bills.

ASSUMPSIT on four bills of exchange, drawn, at Calcutta, in the year 1847, directed to Reid, Irving, & Co., and indorsed to the plaintiff. The bills were for the sums of 25*l.*, 35*l.*, 50*l.*, and 50*l.* respectively. The declaration averred protest and notice. There was also a count on an account stated.

Plea to the account stated, that the defendant, being a trader in

¹ 20 Law J. Rep. (N. S.) Exch. 414.

Symons v. May.

Calcutta, applied by petition to the Insolvent Court there, and delivered into the court a schedule containing a full and true description of all matters and things required to be set forth therein, and of the said bills of exchange in the declaration mentioned, and of the then holder of such bills, to wit, the plaintiff. The plea then set out the defendant's insolvency, and his discharge from all debts according to the provisions of the 11 Vict. c. 21, the Insolvent Debtors (India) Act.

Replication, that the defendant did not deliver in the said court the said supposed schedule, *modo et forma*.

At the trial, before Pollock, C. B., at the London sittings, after Hilary term last, the facts appeared to be as follows: The plaintiff in 1837, the time of the drawing of the bills in question, resided in London, and the defendant was a partner in a mercantile firm, and resided in Calcutta. The bills were drawn by the defendant in India, were purchased there by the plaintiff's agent, and transmitted to the plaintiff in this country. In 1848, the defendant petitioned the Insolvent Debtors Court in India for his discharge, and delivered his schedule¹ into court, in which the plaintiff's debt was described as follows: "Creditor, A. M. Symons, for the following bills of exchange (describing them) drawn by us upon Messrs. Reid, Irving, & Co., in favor of Moses Symons." It appeared that a person named A. M. Symons resided at Calcutta, but it was not shown that he was in any way connected with these bills.

On the part of the plaintiff, it was contended that the description of the debt in the schedule was not sufficient, and that the plaintiff was entitled to the verdict. The learned chief baron was of that opinion, and directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that the description of the debt was sufficient.

A rule *nisi* having been obtained accordingly, —

Humfrey (*Willes* with him) showed cause, (June 7.) The description of the debt in the schedule was insufficient. A. M. Symons, who is described as the creditor of the defendant, had nothing to do with the bills, and if he had, the description of him in the schedule would be insufficient, as his residence is not stated. The plea admits that the plaintiff was the holder of the bills, and if his real name was unknown to the defendant, it ought to have been so stated in the schedule. In *Hoyles v. Blore*, 14 Mee. & W. 387; s. c. 14 Law J. Rep. (N. S.) Exch. 384, the defendant, by mistake and without fraud, stated in his schedule the debt to be 3*l.* instead of 7*l.*, and it

¹ "In the Court for the Relief of Insolvent Debtors, the schedule of
In the matter of an insolvent.

"I, the said do declare that this my schedule doth contain a full and fair description of me, as to my name, trade, profession, and abode, and of the debts due or growing due from me, and of all and every person to whom I am indebted, or who to my knowledge and belief claim to be my creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as are admitted from such as are disputed by me."

Symons v. May.

was held that the debt was not barred by the certificate. He also mentioned *Beck v. Beverley*, 11 Ibid. 845. (He was then stopped by the court.)

Crowder and *Bovill*, in support of the rule. The defendant gave the best description of the bills that he was capable of giving; he was not bound to give a description of the holder of the bills. The question turns on the 6th section of the act of Parliament, and that section does not state any particular mode of describing the bill. The statement of residence is not necessary. It is sufficient if the debtor give in his schedule a description of his debt sufficient to apprise his creditor that he applies to be discharged in respect of that debt. *Forman v. Drew*, 4 B. & C. 15; s. c. 3 Law J. Rep. K. B. 129. *Wood v. Jowett*, Ibid. 20, n.; s. c. 3 Law J. Rep. K. B. 227, is to the same effect. So where an insolvent stated in his schedule that he was indebted to A. for goods, and that A. held his acceptance for the amount, and A. had, without the knowledge of the insolvent, indorsed the bill over, it was held that the description was sufficient. *Reeves v. Lambert*, 4 B. & C. 214.

[*Platt*, B. The act of Parliament, in sect. 5, states that the petition is to be in a certain form, with such additions and variations as may be necessary to adapt it to the particular case. Then the insolvent is to state that his schedule contains a full and fair description of the debts due and of every person to whom he is indebted.]

The schedule in this case contains a solemn declaration as to the truth of its contents, and full credit ought to be given to that schedule. This was a good *prima facie* schedule. The defendant was not bound to state the name of the holder of the bills; it was sufficient if he gave a full description of the debt. *Boydell v. Champneys*, 2 Mee. & W. 433; s. c. 6 Law J. Rep. (N. S.) Exch. 122, applies. There the court said the party could not reasonably be expected to know the name of the holder of the bill. The rule laid down in the cases is, that the description is sufficient, unless there was an intention to deceive the creditor, or he was in fact deceived.

[*Martin*, B. The description was good upon the face of it, and the question was, whether it could be shown *aliunde* that the description was incorrect. But here the description was incorrect on the face of the schedule.

Alderson, B. Here we have nothing but the schedule, and the description in that is insufficient.]

The name of the holder need not have been inserted at all.

The case having been adjourned, on a subsequent day, —

POLLOCK, C. B., said: In the case of *Symons v. May*, which was tried before me, it is unnecessary to hear any further arguments on the point. It appears to the court¹ that the description in the schedule is not sufficient, and, therefore, the rule will be discharged.

Rule discharged.

¹ POLLOCK, C. B., ALDERSON, PLATT, and MARTIN, BB.

Sellers v. Dickinson.

SELLERS v. DICKINSON.¹

Easter Term, May 4, 1851.

Patent — New Combination — Specification — Infringement.

There may be a patent for a combination of old and new mechanism; and such patent will be infringed by using so much of the combination as is material; and it will not be less an infringement because the result is attained by the substitution of a mechanical equivalent.

In the specification of a patent for "improvements in looms for weaving," the plaintiff declared that his improvements applied to that class of machinery called power looms, and consisted "in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." After describing the manner in which that was done in ordinary looms, the specification proceeded thus: "The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or sley striking against the 'frog,' (which is fixed to the framing.) In my improved arrangement the loom is stopped in the following manner: I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the 'swell,' but instead of its striking a stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre and throw a clutch box (which connects the main driving pulley to the driving shaft) out of gear, and allows the main driving pulley to revolve loosely upon the driving shaft, at the same time that a projection on the lever strikes against the 'spring handle' and shifts the strap; simultaneously with these two movements, the lower end of the vertical beam causes a break to be brought in contact with the fly wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving," and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the "clutch box" was not used, but instead of it the "stop-rod finger" acted on a loose piece or sliding frog; but instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms, by means of the action of the "clutch box" in combination with the action of the break, was new and useful; also that the plaintiff's arrangement of machinery for bringing the break into connection with the fly wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's:—

Held, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent.

CASE for the infringement of a patent for "an invention of certain improvements in looms for weaving."

The declaration, which was in the usual form, assigned the following breaches: That the defendant put in practice a part of the invention, and also did counterfeit, imitate, and resemble the invention, and also did make and cause to be made divers additions to the invention, and subtractions from the same, whereby to pretend himself the inventor or deviser of such invention.

Pleas, first, not guilty; secondly, that the plaintiff was not the true and first inventor; thirdly, that the invention was not new as to the public knowledge, use, and exercise thereof; fourthly, that the plain-

tiff did not by the specification particularly describe and ascertain the nature of the invention; fifthly, that the plaintiff did not within six calendar months next after the date of the letters patent cause a specification to be enrolled in the Court of Chancery; sixthly, that the plaintiff by his petition represented to her majesty that the invention was an invention of improvements in looms for weaving; that her majesty, confiding in such representation, and in consideration thereof, granted the letters patent, and that the representation so made was false and untrue; seventhly, that the invention was not of any use, benefit, or advantage whatsoever to the public.

The plaintiff joined issue on the first, second, fourth, and fifth pleas, and replied to the third, sixth, and seventh by traversing the allegations contained therein respectively.

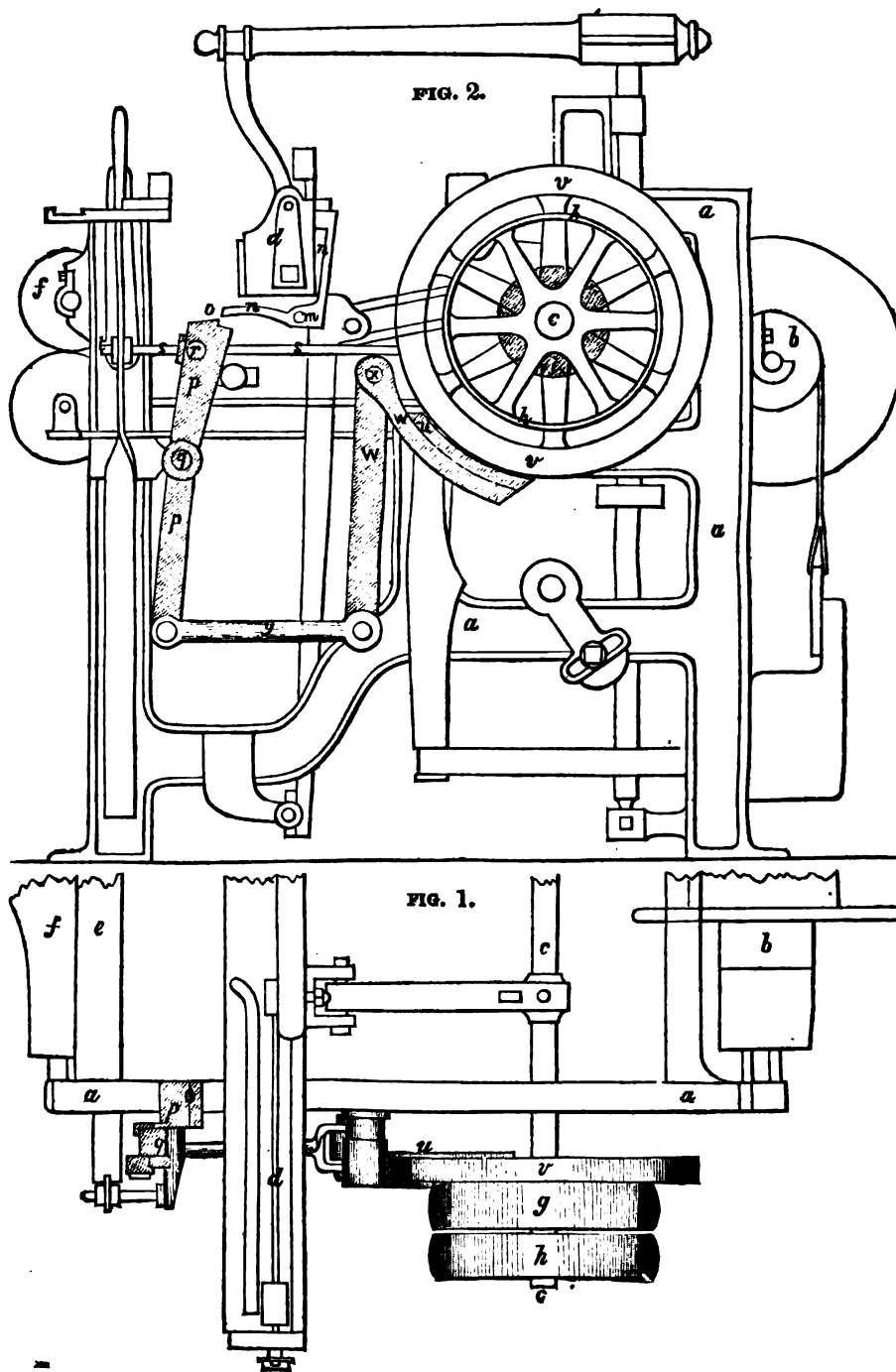
The defendant's notice of objections was in terms similar to the pleas.

At the trial, before Wightman, J., at the Liverpool Summer assizes, 1849, it appeared that the patent in question was granted to the plaintiff in March, 1845, and that the specification, after reciting the letters patent, proceeded as follows:—

"My improvements in looms for weaving apply to that class of such machinery now commonly called or known as "power looms," and consist in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever it does not complete its course from one shuttle box to the other. In ordinary power looms this object is effected in the following manner: Each shuttle box is provided with what is called a 'swell,' (which projects from the outside of the shuttle box whenever the shuttle is in the box,) against which a small lever fixed upon the 'stop rod' bears; upon the stop rod is also fixed another small lever or finger, which (whenever the shuttle is absent from both boxes at once, and consequently the swell does not project) falls down and comes in contact with a stock piece, called the 'frog,' which is fixed to the framing, thus preventing the lathe or sley beating up any further and injuring the cloth; at the same time, a small apparatus fixed to the sley strikes against the 'spring handle' of the loom, and causes it to shift the driving strap from the fast pulley on to the loose one, and thus stop the action of the loom. The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or sley striking against the frog, (which is fixed to the framing,) especially if the loom is working rather fast. In my improved arrangement the loom is stopped in the following manner: I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever, which bears against the swell, but instead of its striking against a stop or frog fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. This lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre and throw

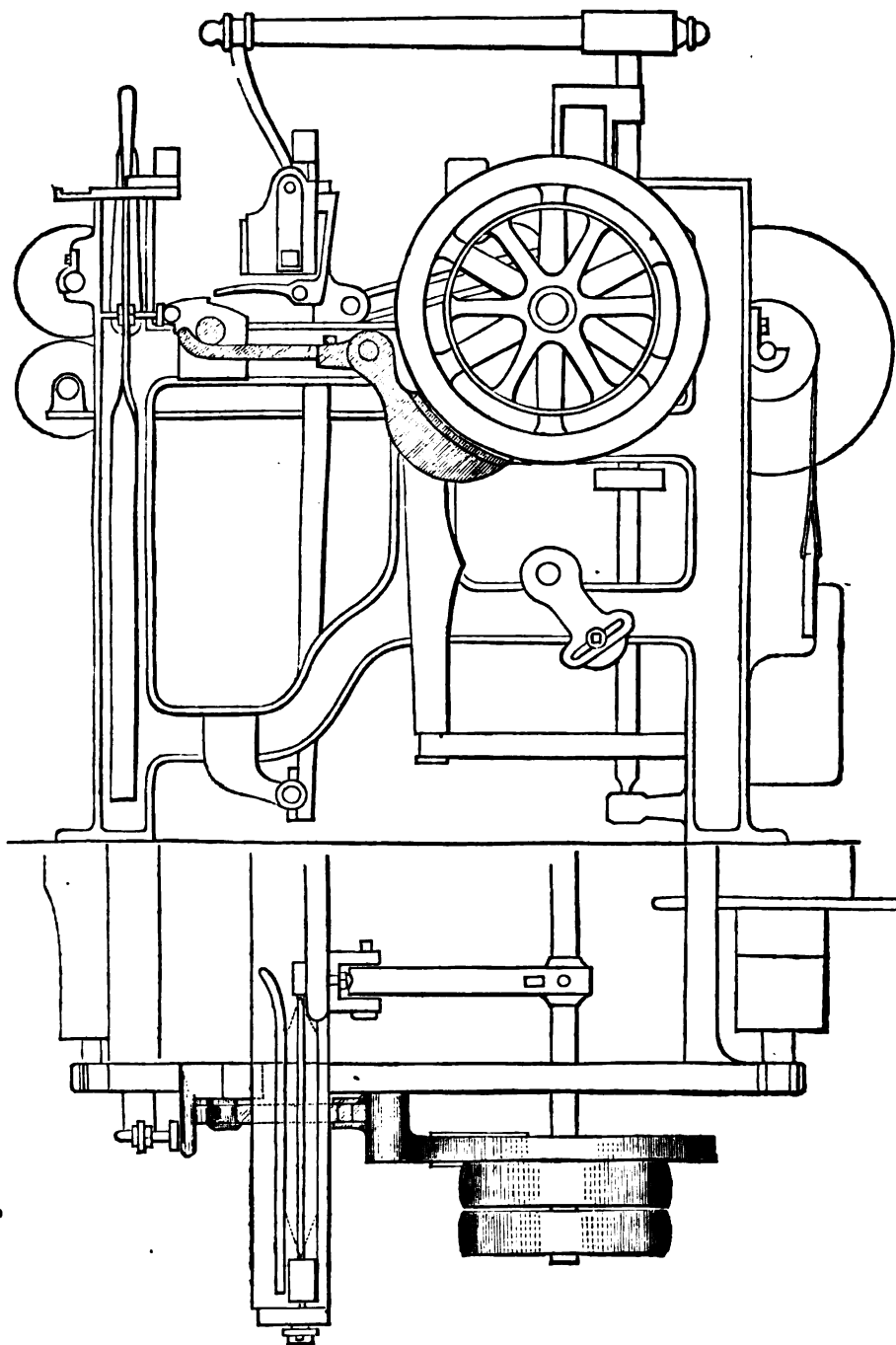
Sellers v. Dickinson.

SELLERS'S PATENT.



Sellers v. Dickinson.

DICKINSON'S PATENT.



Sellers v. Dickinson.

a clutch box (which connects the main driving pulley to the driving shaft) out of gear, and allows the main driving pulley to revolve loosely upon the driving shaft, at the same time that a projection on the lever strikes against the spring handle, and shifts the strap. Simultaneously with these two movements, the lower end of the vertical lever causes a break to be brought in contact with the fly wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock, at whatever speed the loom may be working. But in order that my improvements in looms for weaving may be perfectly understood, I have attached to these presents a drawing, in which Fig. 1 is a plain view (as seen from above) of part of a power loom, with my improved arrangement applied thereto; and Fig. 2 is a side or end view of the same.¹ In these figures, in order more clearly to illustrate my invention, the new parts are represented as shaded with the color, the ordinary parts of the loom being drawn in outline only. *a a* is the main or side framing of the loom, *b* is the yarn roller or beam, *c* the crank shaft, *d* one of the shuttle boxes, *e* the breast beam, and *f* the cloth roller. Upon the crank shaft *c*, the pulleys *g* and *h* are mounted as usual, except that the pulley *g*, which, in ordinary power looms, is keyed fast upon the crank shaft, is, in this instance, placed loose upon the same, and is connected with it by means of a clutch box, one half (*i*) of which is cast on to the pulley *g*, and the other half (*k*) slides upon a feather or key (*l*). The clutch box is thrown out of gear for the purpose of stopping the loom in the following manner: Upon the stop rod *m* (see Fig. 2) are fixed the stop-rod fingers *n*, (of which only one is shown in the drawing, the other being at the other end of the loom,) which, whenever the shuttle is absent from both boxes at once, and consequently neither swell projects, falls down and comes in contact with a stop or notch (*o*) at the upper end of the vertical lever (*p*). This lever (*p*) is mounted upon a pin or stud at *q*, and is furnished with a small roller or bowl (*r*), which, acting against the projection upon the end of the lever *s*, will cause the lever to vibrate upon its centre, and draw the clutch (*i*) out of contact with the clutch (*k*), thus allowing the pulley (*g*) to revolve loosely upon the crank shaft; at the same time the projection (*t*), at the top of the lever (*p*), will strike against the spring handle, and shift the driving strap on to the loose pulley (*h*), as usual. Simultaneously with these movements, the break (*u*) is brought into contact with the fly wheel (*v*) in consequence of its being fixed to the bell crank lever (*w*), mounted upon a fulcrum at *x*, the lower end of which lever is connected to the lever *p* by the link *y*. *z* is a spring for the purpose of keeping the two halves *i* and *k* of the clutch box in gear, except when thrown out as above described.

Having now described the nature and object of my said invention, together with the manner of carrying the same into practical effect, I would observe that I claim as my invention the above-described novel arrangement of mechanism for stopping the loom whenever the shuttle does not complete its course from one shuttle box to the other, by

¹ See the drawing, p. 546.

Sellers v. Dickinson.

disconnecting the main driving pulley from the driving shaft; and also the method of bringing a break into connection with the fly wheel, for the purpose of preventing the lathe or sley from beating up any farther, and injuring the cloth by the shuttle stopping in the shed, or between the warp threads."

It was proved that in power-loom weaving it sometimes happened that the shuttle failed to travel from one box to the other, in which case it became important to stop the action of the machine. In the original power loom, when the shuttle was absent from the box, and was trapped in its course, the stop-rod finger, not being elevated, came in contact with a "frog" fixed to the frame of the loom, and arrested the progress of the sley at such a point as to prevent the shuttle breaking the warp threads, at the same time throwing the spring-lever handle out of its place and passing the strap from the fast on to the loose pulley. That was attended with so violent a concussion as frequently to break various parts of the machinery. By the plaintiff's invention, the whole of the momentum imparted to the sley, and consequently to the stop-rod finger, is received on the notch at the upper part of the vertical lever, and by that means is transmitted to the break, which, being suspended on a point, is brought in contact with the periphery of the fly wheel, and immediately stops the machinery without the slightest shock. The arrangement has this peculiar property, that the higher the velocity, the intensity of the momentum increasing, the greater is the action of the break on the wheel. The clutch box is a well-known mechanical operation for stopping and setting on the power, but its application as combined with the break is new. Before the plaintiff's invention, breaks of various kinds had been used to stop the fly wheel, but no break had been applied in the manner the plaintiff applied it, viz., by employing the momentum of the sley, through the medium of the finger of the stop rod, to put a break on the fly wheel.

In September, 1848, the defendant obtained a patent for "certain improvements in and applicable to looms for weaving," and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the clutch box was not used, but instead of it the stop-rod finger acted on a sliding piece or loose frog, and instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever; and by reason of the pin travelling on an inclined plane the break was applied on the wheel gradually, and not simultaneously. The defendant's specification relating to this part of the claim was as follows:—

"My improvements consist of a certain novel construction and arrangement of apparatus whereby the loom is thrown out of gear and its motions suspended when the shuttle fails to complete its traverse from one shuttle box to the other, and remains in the shed while the reed is beating up. In ordinary power looms this is effected by the contact of the 'finger' of the 'stop rod' with the 'frog,' a rod or projection from the latter striking the 'spring handle' and traversing the driving strap from the fast to the loose pulley, or by allowing the

Sellers v. Dickinson.

reed to swivel in the top rail or sley cap, and making a spring joint in the back board of the shuttle race, the combined actions of which operate by the intervention of levers upon a stop rod, and placed beneath the bed of the sley, the finger of which, when the shuttle is caught in the shed, acts upon the spring handle, and effects the stoppage of the loom. The characteristic features of this part of my invention are—that, by a simple arrangement, the advantages of the ‘fast’ and ‘loose’ reed looms are combined; that it is suited to the manufacture of light or heavy fabrics, from the circumstance that the reed is fast or immovable so long as the shuttle performs its duty, (and is, therefore, equal to beat-up cloth of any strength;) but that, when the shuttle traps, or is caught in the shed, the reed, yielding to the pressure of the shuttle, swivels in the sley cap, and the loom is immediately stopped, without injury to the warp or weft. The absence of the shuttle from the shuttle box while the reed is beating up, permits a small finger or detector to act upon the spring handle of the loom, and, simultaneously with the traverse of the driving strap from the fast to the loose pulley, applies a break to the periphery of the fly wheel. These operations are effected with a fast back board to the shuttle box, and an ordinary swell therein, which latter is acted upon by the shuttle at every prick, while the sley sword is neither recessed nor cranked, and the stop rod fixed beneath the sley is dispensed with. As the break levers which I make use of are elastic in their action, it will be found that, so soon as the frog is liberated from contact with the stop rod, or the spring handle is placed in the working position, the fly wheel is also relieved from the pressure of the break, and the loom is prepared to resume its operations.”

It was objected on the part of the defendant, that the plaintiff's specification did not sufficiently state the nature of his invention; that if the claim was for the combined action of the clutch box and the break, there was no infringement of that combination; if the claim was for the several parts of the machinery, then, the clutch box being old, the patent was too large. The learned judge told the jury that the claim of the plaintiff was not for the principle either of stopping power looms by means of the clutch box, or by stopping them by means of a break upon the fly wheel, but it was for a novel arrangement of mechanism designed for the purpose of instantly stopping the whole of the working part of the loom whenever the shuttle stops in the shed, without such a concussion as would endanger or damage the machinery; that, if the question were whether the defendant had imitated the combined action of the clutch box and the break, undoubtedly he had not infringed the plaintiff's patent, for he had left out the clutch box. His lordship left to the jury the following questions: “Is the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch box in combination with the action of the break, as described by the plaintiff, new? Is it useful? Is the plaintiff's arrangement of machinery for bringing the break into connection with the fly wheel new? Is it useful? Is the arrangement of machinery for bringing a break into connection

Sellers v. Dickinson.

with the fly wheel in the machines made by the defendant the same substantially as the plaintiff's arrangement of machinery for that purpose?" The jury answered all these questions in the affirmative; whereupon his lordship directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him, if the court should be of opinion that the plaintiff was not entitled to recover.

A rule *nisi* having been obtained accordingly, and also for a new trial on the ground of misdirection, —

Martin, Atherton, and Webster now showed cause. First, the specification is good. Its language is not to be criticized as upon a special demurrer, but it is sufficient if it distinctly and clearly explains the invention claimed. *Newton v. The Grand Junction Railway Company*, 5 Exch. 331; s. c. 20 Law J. Rep. (N. S.) Exch. 427; *post*, 557. The invention claimed is "a novel arrangement of mechanism for stopping the loom whenever the shuttle does not complete its course from one shuttle box to the other," which is effected by disconnecting the main pulley from the driving shaft, and by bringing a break in connection with the fly wheel. The jury have found that the arrangement for the combined action of the clutch box and the break upon the fly wheel is new and useful; the use of the clutch box being old will not, therefore, affect the right of the plaintiff to a patent, for he only claimed in respect of the novel arrangement of old mechanism. In *Templeton v. Macfarlane*, 1 House of Lords Cases, 595, the specification claimed two processes, one of which was old, and therefore not limited, as here, to the new arrangement of old materials. Secondly, the defendant's machinery is an infringement of the patent as specified. A new combination of old mechanism may be the subject of a patent, and there may be an infringement by adopting part of the combination. *Newton v. The Grand Junction Railway Company*, Hindmarch on Patents, p. 489. The finding of the jury brings this case within the principle laid down by Tindal, C. J., in *Walton v. Potter*, 1 Webster's Pat. Cas. 586: "Where a party has obtained a patent for a new invention, or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form, or, in immaterial circumstances, the nature or subject matter of that discovery, to obtain either a patent for it himself, or to use it without the leave of the patentee, because that would be in effect, and in substance, an invasion of the right; and, therefore, what you have to look at upon the present occasion is, not simply whether in form, or in circumstances that may be more or less immaterial, that which has been done by the defendants varies from the specification of the plaintiff's patent, but to see whether in reality, in substance and effect, the defendants have availed themselves of the plaintiff's invention, in order to make that article which they have sold in the way of their trade."

Watson, Crompton, and Cowling, in support of the rule. The claim may be considered as for a new combination of known mechanism, in which case there has been no infringement of that combination, or it

Sellers v. Dickinson.

may be for the several parts of the machinery described in the specification, and in that case the patent is void, as it is admitted the clutch box is old. The claim must be taken to be for the whole, and for each part, because neither any particular part nor the combination of the whole is claimed with sufficient certainty. *Carpenter v. Smith*, Webster's Pat. Cas. 532. *Templeton v. Macfarlane*. To render a patent for a new combination of old materials valid, the specification must clearly express it. *Hill v. Thompson*, 3 Mer. 622. The improvements specified are effected by a process for the purpose of stopping the momentum already given, and a process for preventing an accumulation of power to the loom. The clutch box has long been used for these purposes, and the patent is therefore vitiated. If, indeed, the combination of the clutch box and the break is all that is claimed, then the plaintiff has sustained no injury, for the defendant has only adopted the break, omitting the clutch box, and has, therefore, committed no infringement. No doubt, where a part of that which is claimed as an invention is used there is an infringement, but the authorities do not establish that the use of part of a new arrangement of old mechanism is an infringement of the patent.

POLLOCK, C. B. I am of opinion that the rule ought to be discharged. There are two points: first, whether there is any objection to the specification; next, whether there has been any infringement. These questions must be decided with reference to the findings of the jury, that the plaintiff's arrangement of machinery for stopping looms by means of the clutch box in combination with the break is both new and useful, and also that so much of the plaintiff's arrangement of machinery as the defendant has used, namely, that for bringing a break into connection with the fly wheel, is of itself new and useful; and that what the defendant has used is substantially the same as the plaintiff's. Upon the facts so found (for the question is not whether the evidence supported the findings) I think the specification is good. The first finding is, that the arrangement of machinery for stopping looms by means of the combined action of the clutch box and break is new and useful. And I think that is sufficiently specified. The invention of the plaintiff is in one point of view simple. He calls it "my invention of certain improvements in looms for weaving," but he says, "the improvements apply to that class of machinery known as power looms, and consist in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." He then describes the way in which he does it. He says, the common mode is performed in a certain manner; and he then goes on to describe his mode of separating the machine from the moving power by means of a clutch box; and he associates with that a break, the effect of which he thus expresses: "Simultaneously with these two movements, the lower end of the vertical lever causes a break to be brought in contact with the fly wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock, at whatever speed the loom may be working." Then

comes his claim; and, I must say, that though at first I doubted whether the claim consisted of two parts or of one only, yet on reading the specification with that candor and indulgence with which a specification should be read, it appears to me to consist of one only. He says, "I claim as my invention the above-described novel arrangement of mechanism;" and we must understand the expression "novel arrangement" to mean the same thing in the latter part of the specification as in the former; and it is clear that in the former it means one thing only. He says, "my invention consists in a novel arrangement of mechanism for instantly stopping the loom." Then he mentions the occasion when that would be required, viz., "whenever the shuttle does not complete its course from one shuttle box to the other," by disconnecting the main driving pulley from the driving shaft; "and also (which ought to be read "and by") the method of bringing a break into connection with the fly wheel, for the purpose of preventing the lathe or sley from beating up any farther and injuring the cloth by the shuttle stopping in the shed, or between the warp threads." That being the case, the specification is free from objection. The second question is, whether the patent has been infringed. It was argued that there can be no infringement of a patent for a combination, unless the defendant has used the whole combination. But that is not so, for there may be an infringement by using so much of a combination as is material, and it would be a question for the jury, whether that used was not substantially the same thing. I recollect a patent for an invention, a part of which, at first supposed to be useful, turned out to be prejudicial, and was afterwards left out, but the patent was nevertheless sustained. If that had been a combination of matters, each of them old, but entirely new as a combination, and the jury had found that the substantial parts of the combination were used, that, I think, would have been an infringement of the patent. Looking at this patent fairly, what is it for? It is for a mode to separate the machine from the source of power, and at the same time to stop the momentum which has already accumulated, and to do this by one and the same operation; in fact, to make the machine itself do it. Whenever the shuttle remains among the sheds, and does not arrive at the shuttle box, the machine is so constructed that by one operation it is thrown out of gear, and at the same time a break is applied to the fly wheel so as to stop the momentum. The defendant has substituted for the clutch box the old plan of the "frog," and instead of separating the power and the machine by a clutch box, and so throwing the machine out of gear, he has used the old method of throwing off the strap, but he has adopted the break, which the jury have found is, in itself, an arrangement of machinery new and useful. We are not now to decide what would have been the plaintiff's rights if the clutch box had been entirely new, and the plaintiff had complained of its use; but I think it may be laid down as a general proposition, (if a general proposition can be laid down on a subject applicable to such a variety of matters as patent law — matters indeed incommensurable with each other, for the same doctrine would scarcely apply to a medicine and a new material or new

Sellers v. Dickinson.

metal,) that if a portion of a patent for a new arrangement of machinery is in itself new and useful, and another person, for the purpose of producing the same effect, uses that portion of the arrangement, and substitutes for the other matters combined with it another mechanical equivalent, that would be an infringement of the patent. It appears to me, therefore, with reference to the facts found by the jury, that the specification is good, and that the defendant has infringed the patent.

ROLFE, B. I am also of opinion that the rule ought to be discharged. The chief question is the construction of the specification. The patentee claims, in my opinion, a matter entirely new, subject to a qualification I shall presently mention. I form this opinion from reading the specification as a person of ordinary understanding would do, not loosely conjecturing any thing, but at the same time not scanning it as if it were a special plea; and I must say it is one of the fairest specifications I have seen, and is calculated fully to express the invention. The plaintiff begins by saying that his improvements "consist in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom, whenever the shuttle stops in the shed." It is well known that, in working the power loom, it occasionally happens that the shuttle gets entangled in the warp, and if the machine be not instantly stopped, the whole fabric is liable to be damaged. The plaintiff then proceeds to tell in what mode that has hitherto been effected; and for this purpose, it is not necessary to consider whether he has in point of fact correctly stated the mode, but, in construing what his improvements are, we must consider them with reference to that which he describes as the present mode, and which he says is this. [His lordship read that part of the specification.] In plain language, formerly there was such a contrivance of machinery, that whenever the shuttle got entangled, in an instant a certain part of the machine, which he calls the "finger," struck against a thing called the "frog," which was fixed to the framework of the machine, the effect of which was to throw the work out of gear, by throwing the strap off the fast pulley on to the loose pulley. He then states what he conceives to be the defects of the old mode. [His lordship read that portion of the specification.] Then, having stated that his object is to introduce some improvements which shall have the same effect of stopping the machine, but without the violent shock, he says the mode he proposes is this. [His lordship read that part of the specification.] That is to say, whereas heretofore the strap has been thrown off by the finger striking against the framework, and by a certain apparatus which shifted it from the fast pulley on to the loose pulley, now I contrive to avoid that shock, by making the finger strike on a vertical lever, vibrating on a pin or stud, and not on a part of the framework; the result of which is, that by a certain arrangement, afterwards described, the strap is thrown off. I do not see that the clutch box is claimed as an invention. He conceives that the best mode of fixing on the machinery is with a clutch box,

Sellers v. Dickinson.

and in substance he says, my improvement, which mainly consists in striking the vertical lever, whether in connection with a clutch box or not, has the effect of throwing the machine out of gear, as was done before, but without the violence of the shock. And he then adds, "simultaneously with those two movements, the break is brought in contact with the fly wheel." [His lordship read that part of the specification.] It is wrong to suppose that in this specification the words "stopping every motion of the loom" necessarily mean the moving power. They are used very generally for "stopping the momentum which the machine has acquired." Then, what is it the plaintiff has claimed? Why, whereas formerly the mode of stopping the machine was by throwing off the strap by means which caused a violent jar, I have introduced an arrangement of machinery which shall have the same effect of throwing off the strap as before, but without that jar; and I mention a clutch box, because I consider that the best mode of fixing on the wheels; and simultaneously I introduce that which the jury has found to be a complete novelty; I check the momentum already acquired, by making the same machinery apply the break to the fly wheel. Can any thing be more clear? It seems to me wholly a new invention; except, indeed, if the plaintiff had proceeded against any person for using the clutch box, or for throwing the strap off the pulley, he could only have succeeded by showing that they had done so by means of the vertical lever. The whole of the application of the break is a novelty; as to the other part, he does not profess it to be a novelty; on the contrary, he states exactly how it was done before, and points out what his distinctions are; and then, after having described in detail the mode of making the machinery operate, he says, "I claim as my invention," &c. [His lordship read that part of the specification.] It seems to me, therefore, that, looking at the construction of this specification, what the plaintiff claims is a new invention altogether, by making the stoppage consist in the striking of a finger, (nearly, but not quite, in the same position as in the old machine,) not against the framework, but against a lever arranged in the mode which he has detailed in that part of the specification which I have referred to, and which has the same effect that the former machine had, of throwing the strap off, whether there be a clutch box or not; and then there is introduced a new element altogether, namely, a break which, at the same time that the machinery is put out of gear, has the effect of stopping the fly wheel. That is the construction of the specification. Then I think that when the complaint is, that the infringement has been of that which is found to be entirely new, the learned judge was perfectly right in his direction to the jury. The question was not whether there had been any infringement of the combined action of the clutch box and the break, but whether the defendant imitated that one thing, namely, the application of the break to the fly wheel through the momentum of the sley. For that reason, there having been no misdirection, and the specification being good, the rule must be discharged.

Sellers v. Dickinson.

PLATT, B. I am of the same opinion. Until the year 1845, there was no means of stopping the power loom, when the shuttle failed to perform its course, without causing a violent shock. The plaintiff applied his ingenuity to the subject, and elaborated a mechanical contrivance for stopping the loom instantaneously, and without any shock. That is effected by a combination of machinery which the jury has found to be new and useful, and by which at the same moment the loom is put out of gear, and the fly wheel is instantaneously stopped by a pressure equivalent to the velocity of the machine at the time; because we all know that the momentum of the machine depends on the quantity of matter multiplied into the velocity, and the quantity of matter being always the same, of course the pressure would be in proportion to the velocity of the machine. The counter-acting force which would be used for destroying its momentum would always be in proportion, and, therefore, it would create an absolute stability, or rather it would produce actual quiet, because two forces of the same amount opposed to each other in opposite directions destroy each other. Certainly a most ingenious invention. Then, the next question is, whether the plaintiff, having made this invention, has properly described it in his specification. He first points out the object of his improvement, namely, "instantly stopping" the whole of the working parts of the loom, whenever the shuttle stops in the shed. Then, after giving an account of the mode in which looms were stopped up to that time, he states the manner in which he proposes to do it; and then he concludes by stating; that simultaneously with these two movements the break is brought in contact with the fly wheel. Surely, any one who reads that specification must understand what the object of the invention was, and the mode by which it is to be effected is most universally described. Then, what does the plaintiff claim? He says, "I claim as my invention the above-described novel arrangement of mechanism." What for? "For stopping the loom whenever the shuttle does not complete its course from one box to the other." Then he shows how that is done: "By disconnecting the main driving pulley from the driving shaft, and also the method (which the context requires to be read "and *by* the method") of bringing a break in connection with the fly wheel, for the purpose of preventing the lathe or sley from beating up any farther," &c. Therefore, it seems to me that the specification most distinctly describes the invention; and the jury having found that it is new and useful, and that the act of the defendant was substantially an infringement of it, the rule ought to be discharged.

Rule discharged.

Newton v. The Grand Junction Railway Company.

NEWTON v. THE GRAND JUNCTION RAILWAY COMPANY.¹

Hilary Term, January 24, 1846.

Patent — Combination of Things new and old — Imitation.

Where a patent is granted for a combination of several things, some of which are old and some new, the question for the jury is whether, taking the specification altogether, that which is claimed as a whole is new; and the imitation by a chemical or mechanical equivalent of a part of the combination, which is both material and new, is an infringement.

CASE for the infringement of a patent for "certain improvements in the construction of boxes for axles or axletrees of locomotive engines and carriages; and for the bearings or journals of machinery in general."

Pleas, (*inter alia*), not guilty; that the invention was not new; and that no sufficient specification was enrolled.

At the trial before Cresswell, J., at the Liverpool Summer assizes, 1845, it appeared that the patent in question was granted to the plaintiff in May, 1843, and that the specification (so far as material) was as follows: "This invention consists of certain improvements in the manner of making or constructing the boxes within which the gudgeons or journals of machinery of various kinds, and particularly the axles of railroad cars, of locomotive engines, and of other cars and carriages are to run; and those improvements are applicable not only to boxes for axles or gudgeons, which are divided so as to form semi-cylinders, but also to boxes, bearings, or sockets that are not divided, and which form a continuous circle, and also to sockets which are square, or of any other desired form, and within which a rod or bar is to slide, as, for example, the guide rods used in locomotive and other steam engines. The boxes in which the gudgeons or axles are to run are to be formed and prepared in the ordinary way of those which are to be received into the housings or plummer blocks of locomotive engines, cars, and other machinery, they being made of brass, bell metal, or any other metal or metallic compound which has sufficient strength, and is capable of receiving a coating of tin. The inner parts of these boxes are to be lined with any of the harder kinds of metallic compounds or alloys, known under the names of britannia metal or pewter, and of which compounds or alloys block tin is the basis. An excellent compound or alloy for this purpose may be prepared by taking about fifty parts of tin, five of antimony, and one of copper; but other compounds or alloys analogous in character may be used. To prepare the boxes for this composition, they are to be cast with projecting rims or fillets along their interior edges, and on their ends within their semi-cylindrical parts, or on the ends only of the boxes or sockets when they are not divided. The interior of these

¹ 20 Law J. Rep. (N. S.) Exch. 417. This case was referred to on the argument of *Sellers v. Dickinson*, and decided in Hilary term, 1846, but has not been hitherto reported.

Newton v. The Grand Junction Railway Company.

boxes, and the ledges, fillets, or rims above named are then to be cleaned and tinned in the usual way of performing that operation. A cylindrical or semi-cylindrical core of the exact size (in its cylindrical part) of the gudgeon which is to run within the bearing, or of such shape and dimensions as may be necessary for the sockets of a slide, or of the stem of a valve, is then to be taken, and upon such core the box to be lined is to be placed in such manner as that the core shall coincide within the situation that the axle or gudgeon slide or stem is to occupy within such box when in use. The boxes are to be of such size as that, when the core is so placed it shall not touch, but shall be nearly in contact with, the projecting rims or fillets; its distance therefrom may be about the thirty-second part of an inch, more or less. The ends of the boxes are then to be closed by any suitable means; so that the interior shall form a mould to receive the lining of composition, metal, or alloy, which is to be fused and poured into it, a proper aperture being prepared for that purpose. This aperture, in the boxes for railroad cars and locomotive engines, may consist of a hole an inch or more in diameter, left through their middles in the act of casting them, and in all cases the opening may be so proportioned as to suit the size of the box that is to be lined. The metallic composition, when melted and poured into the box, which has been prepared by being tinned, will unite firmly with its interior, and will cover the edges of the rims or fillets, so as to prevent contact between them and the gudgeons, axle, slides, or stems, which they are to receive; whilst the ledges will, at the same time, effectually prevent any tendency in the composition, metal, or alloy to spread from the weight or friction of the load, or the motion of a slide or stem. In boxes thus prepared, the heating and abrasion, which are so apt to occur in boxes so ordinarily constructed, do not take place, and their durability is consequently increased. By the employment of the metallic alloy in sheaves, and other articles of this description, and the substitution of a hard compound metal of copper and tin for the iron boxes, and for the iron pins or axles upon which the sheaves are to run, the injurious consequences frequently resulting from the oscillation of the iron are obviated, such sheaves always turning freely on their pins or axles, whilst, when made of iron, they are often obstructed, and sometimes set fast from the cause above named. I claim as the invention, making or constructing the boxes within which the journals or axles of machinery are to run, or within which the rods of slides, or the stems of valves and other analogous parts of machinery, are to slide, by providing them with rims or fillets along their edges and at their ends, or at their ends only, according to the nature and form of the box, in the manner and for the purpose herein set forth; and lining such boxes, prepared in such or a similar manner with a metallic composition or alloy, of which tin is the basis, for the purpose herein fully made known and described. Instead of employing rims or fillets for the purpose of holding or retaining the metallic compound or alloy, other methods, such as knobs, projections, or holes, may be adopted. I do not, therefore, intend to confine myself to the precise manner in which the invention is carried into effect; it is evident that

Newton v. The Grand Junction Railway Company.

the mode may be varied without departing from the nature of the invention."

Formerly, the boxes in which the axletrees of locomotive engines ran were made of hard metal, chiefly brass, and consequently heating and abrasion existed to a great degree. That was obviated by the plaintiff's invention. The defendants, after the date of the patent, made boxes with a lining of tin for their locomotive engines; they did not, however, make their boxes with rims or fillets, or any equivalent, nor did they use any alloy, but in the middle of the box, while the brass was hot, they rubbed a stick of tin, working it, not by a mould, but by a soldering iron, so that it was thick in the middle, fined off to the edges. The learned judge told the jury that they must take the whole of that for which the patent was granted, including the fillets within the outer case, as well as the lining with tin and the soft metal, and say whether the invention was new. Also, that if a patent was granted for a new combination of several things known before, that did not prevent any one from using those parts which were old. That it was for the jury to say whether the part here used by the defendants was substantially the same thing as the plaintiff's invention. The jury having found a verdict for the plaintiff, in the following Michaelmas term a rule *nisi* was obtained to set aside the verdict, and for a new trial, on the ground (amongst others) of misdirection, against which

Baines, Martin, Adolphus, and Webster showed cause, (January 29, 1846.) With respect to the question of novelty, they argued that the patent was for a combination only, and therefore the jury were properly told to take the whole of that for which the patent was granted, and say whether it was new. As to the question of infringement, they argued that the invention consisted in the application of the soft metal to the hard metal, for the purpose of lessening friction; and that the rims or fillets were not an essential part of the patent, but merely the best mode of carrying out the invention; and that according to the principle laid down in *Heath v. Unwin*, 13 Mee. & W. 583; s. c. 14 Law J. Rep. (N. S.) Exch. 153, if a person substituted an equivalent, whether chemical or mechanical, for a part of an invention which was new and useful, that was an infringement.

Jervis, Crompton, and Cowling, in support of the rule, argued, first, that, upon the true construction of the specification, the claim was for lining the hard metal by means of rims or fillets, or by other mechanical means, so that the alloy might adhere; and that the learned judge ought to have left it to the jury to say whether the application of the alloy, combined with the rims and fillets, was new. Secondly, that the plaintiff's was a mechanical, and the defendants' a chemical process; and that the use of a chemical equivalent was no infringement of a mechanical mode of producing a certain effect. At all events, the learned judge should have left it to the jury to say whether the defendants had infringed the combination.

Newton v. The Grand Junction Railway Company.

POLLOCK, C. B. The rule ought to be discharged. The criterion to be applied on inquiring whether the subject matter of a patent is novel, is to look at the whole specification, and see what is there claimed. Now, referring to the language of this specification, it appears to me that in substance what the patentee claims is the lining of these boxes with an alloy of tin, having certain provisions, partly mechanical and partly chemical, for keeping the lining in its place. That the mode adopted by the plaintiff is partly chemical it is impossible to doubt, because he first tins the inside before the alloy is introduced, and the evidence was, that, by means of that tinning, the alloy is made to unite with the hard metal, which it would not otherwise do. Therefore, I think the jury were correctly told that they were to consider whether the invention was new as a whole—not whether it was new as to every part, because in modern times that is a novelty very rarely met with; the more general subject of a patent now is, some new combination or new application. With respect to the question of infringement, it appears to me that the direction of the learned judge was perfectly correct. If a judge, when a patent case is before him, is to read a lecture on the natural philosophy which belongs to the patent, and be strictly correct in every remark he makes, I am afraid that few verdicts in patent cases would stand. No doubt he is to construe the specification, and tell the jury what the patent is for; but it is for them to say whether the facts brought before them do or do not amount to an infringement. It was argued, that the same criterion is to be applied to the question of infringement as to that of novelty. But that is not so. In order to ascertain the novelty, you take the entire invention, and if, in all its parts combined together, it answer the purpose by the introduction of any new matter, by any new combination, or by a new application, it is a novelty entitled to a patent. But in considering the question of infringement, all that is to be looked at is, whether the defendant has pirated a part of that to which the patent applies; and if he has used that part for the purposes for which the patentee adapted his invention and for which he has taken out his patent, and the jury are of opinion that the difference is merely colorable, it is an infringement. For these reasons, it appears to me that there was no misdirection.

ALDERSON, B. I am of the same opinion. In considering whether the invention is new, the proper mode is to take the specification altogether, and see whether the matter claimed as *a whole* is new. Now, the whole which may be new as claimed may consist in some degree of old parts and in some degree of new parts. The question of novelty, however, will depend on whether the whole, taken together, is new, though it may in part consist of old parts, provided the patentee does not claim the old parts, but only the combination of them, and the new. If that be so, the learned judge was perfectly correct in telling the jury that they were to take the whole of the specification into their consideration, for the purpose of determining

Newton v. The Grand Junction Railway Company.

whether the invention was a novelty. Then, as to the infringement. There, undoubtedly, the question is altogether altered; because, where the invention consists partly of what is old and partly of what is new, the combination is the subject of the patent. Therefore, a person cannot infringe that part of the patent which is old, because the public cannot be prevented from using that which they had before used in that state. If the invention consists of something new and a combination of that with what is old, then, if an individual takes for his own and uses that which is the new part of the patent, that is an infringement of it. The question left to the jury was, whether the part which the defendants had infringed was or was not a new part of the invention. That raised the question, whether the soft metallic lining, as applied to these boxes, was or was not a new invention. If the defendants had shown that that part of the invention had been used before, that would have been an answer to the infringement, even though it might not have been a sufficient answer to the question of novelty; but, in my opinion, the evidence was materially in favor of the plaintiff.

ROLFE, B. I shall add very few observations; indeed, I should have added none, had it not been for the way in which the matter was pressed by the defendants' counsel, as if, in construing the specification, the invention consisted of the rims or fillets, and the rest was a mere adjunct. They discussed and scanned the language of the specification in the same sort of spirit as if it were a plea or replication specially demurred to. That is not the spirit in which a specification should be inspected. The proper mode is to construe it, and see what is the good sense of it; whether that which the patentee claims as his invention is there distinctly and clearly explained. It is true that here the plaintiff begins by describing the form of the boxes in which this lining is to be introduced; but, on looking to the whole specification, it is evident that what he means by "improved boxes" is boxes having a lining of soft metal, that lining being held in its place in the best manner, which he points out. The learned judge told the jury that, in order to find the infringement, they must find that some part of the patent (which means some material part which was new) had been used by the defendants. There was no evidence of the defendants having used any thing but the lining of alloy; therefore, when the jury found infringement, of necessity they found that it was a new invention.

Rule discharged.

Longmeid & Wife v. Holliday.

LONGMEID & Wife v. HOLLIDAY.¹

Trinity Vacation, July 10, 1851.

Case — Breach of Warranty — Action, by whom maintainable.

A tradesman who sells an article which he, at the time, believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness.

A declaration in case by a husband and wife stated that the defendant, who was the maker and seller of certain lamps called Holliday's lamps, sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that, in consequence of the insufficient materials with which it was constructed, it exploded and burnt her. At the trial, the jury found that the accident had been caused by the defective nature of the lamp; but that the defendant was ignorant of this unsoundness, and had sold the article in good faith:—

Held, that, the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract.

CASE. The declaration stated that the defendant, before and at the time of the committing of the grievances hereinafter mentioned, was the maker and seller of certain lamps called the "Holliday lamp," to be used for the purpose of burning in and giving light to houses, shops, and rooms, and thereupon, heretofore, to wit, on, &c., the plaintiff Frederick Longmeid, at the request of the defendant, bargained with him to buy one of the said Holliday lamps, to be burnt and used by the plaintiff F. Longmeid and his said wife in the shop and rooms of the said plaintiff F. Longmeid, to and for a certain price, namely, 10s.; and the defendant then, during such bargaining, falsely, fraudulently, and deceitfully warranted to the said plaintiff F. Longmeid that the said lamp then was reasonably fit and proper to be used for the purpose last aforesaid, and the defendant thereby induced the said plaintiff F. Longmeid to buy the said lamp, and accordingly, by the means aforesaid, then sold the same to the plaintiff F. Longmeid, for the said sum of money, which the said plaintiff F. Longmeid then paid to the defendant; whereas, in fact, the said lamp was not at the time of the said sale and warranty aforesaid, nor afterwards hitherto, reasonably fit and proper to be used for the purpose of being burnt and used by the said plaintiffs, but was then made of weak and insufficient materials, and then was cracked and leaky, dangerous, unsafe, and wholly unfit and improper for use by the plaintiffs or either of them; whereby and by reason and wholly in consequence of the said lamp being so cracked, leaky, and unsafe as aforesaid, the said lamp afterwards, to wit, on, &c., when the said plaintiff Eliza Longmeid, knowing and confiding in the said warranty, lighted the said lamp and attempted to use and burn the same in a certain shop of the said plaintiff F. Longmeid, and whilst she was holding the same in her hand, the said lamp burst, exploded, and fell to pieces, and the spirit and naphtha, then contained therein for the purpose of burning and

¹ 20 Law J. Rep. (N. S.) Exch. 430.

Longmeid & Wife v. Holliday.

lighting the same, then ignited and ran upon and over the said plaintiff E. Longmeid, whereby the said plaintiff E. Longmeid, then and still being the wife of the said plaintiff F. Longmeid, became and was greatly burnt, scorched, and wounded, and became and was sick, sore, lame, and greatly disordered, and was necessarily removed to and confined in a certain hospital, &c.

Pleas — First, not guilty; second, that the plaintiff F. Longmeid did not bargain with the defendant to buy one of the said lamps of the defendant to be burnt and used by the plaintiff and his said wife in the shop and rooms of the plaintiff *modo et forma*, &c.

At the trial, before Martin, B., at the sittings during Michaelmas term, 1850, it appeared that the defendant, who kept a shop (but was not personally a manufacturer) in London for the sale of lamps, sold a lamp, called the Holliday Patent Lamp, to the plaintiff's wife, for the purpose of being used by him and his wife. There was evidence that the lamp was defectively constructed, but no proof that the defendant, who did not personally construct it himself, but had it put together by others, in parts purchased from third parties, knew of the defect; and the jury found that he was not guilty of any fraudulent or deceitful representation, but sold the lamp in good faith. In using the lamp with naphtha, it exploded, and the plaintiff's wife met with considerable personal injury, for which the plaintiffs brought this action, the plaintiff F. Longmeid having previously recovered damages in another action for the defendant's breach of implied warranty of sale. The jury found, on the trial, all the facts for the plaintiffs, except the allegation of fraud, they being not satisfied that the defendant knew of the defects. The defendant's counsel thereupon objected, as the fraud was not proved, that the action would not lie. The learned judge inclined to that opinion, but refused to stop the case, and directed a verdict to be entered for the plaintiffs, reserving to the defendant liberty to move to enter the verdict for him or for a nonsuit.

W. H. Watson having accordingly obtained a rule, —

Miller, Serj., (with whom was *R. B. Miller*.) now showed cause.¹ First, the lamp was purchased expressly to be used in the plaintiff's shop; and there was, therefore, an implied warranty by the defendant that it was fit for that purpose. If a person sells an article for a specific purpose, he undertakes that it is adapted for the purpose for which it is designed. The rule of law on the subject is clearly enunciated by Parke, B., in delivering judgment in the recent case of *Morley v. Attenborough*, 3 Exch. Rep. 500; s. c. 18 Law J. Rep. (N. S.) Exch. 148, where he says, "If goods are ordered of a tradesman in the way of his trade for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose." And this rule has been held, in several cases, to apply with increased force where the vendor is or represents himself to be the maker of the article, and is, therefore, to be presumed to be acquainted with its

¹ May 3, before POLLOCK C. B., PARKE and MARTIN, BB.

Longmeid & Wife v. Holliday.

merits and demerits. In *Jones v. Bright*, 5 Bing. 533; s. c. 7 Law J. Rep. (N. S.) C. P. 213, the plaintiff, a ship owner, was permitted to recover damages from the defendant, who had sold him copper (of which he was the manufacturer) for the purpose of sheathing a ship, but for which it proved quite inadequate. In *Brown v. Edgington*, 2 Man. & Gr. 279; s. c. 10 Law J. Rep. (N. S.) C. P. 66, the defendant was held to be liable for the loss of a cask of wine occasioned by the defective nature of a rope, of which he had represented himself to be the maker, and which he had sold to the plaintiff for the express purpose of raising pipes of wine from his cellar; and in *Shepherd v. Pybus*, 3 Ibid. 868; s. c. 11 Law J. Rep. (N. S.) C. P. 101, the court decided that the builder of a barge must be deemed to have warranted that it was reasonably fit for use, although there was a written contract of sale which was silent as to the warranty. Secondly, the action is maintainable by the husband and wife. The lamp was purchased for the former, but with an express intimation conveyed to the defendant that it was to be employed by the latter. A duty, therefore, was created towards her, for the injury sustained by the breach of which she was entitled to sue. This was fully established by *Langridge v. Levy*, 2 Mee. & W. 519; s. c. 6 Law J. Rep. (N. S.) Exch. 137. There the defendant sold a gun to the father of the plaintiff for the use of himself and sons, on the undertaking that it was a safe one. The gun subsequently exploded and wounded the plaintiff, and it was held that he might recover. In *Pippin v. Sheppard*, 11 Price, 400, and *Gladwell v. Steggall*, 5 Bing. N. C. 733; s. c. 8 Law J. Rep. (N. S.) C. P. 361, it was decided that a surgeon might be sued by a patient for an injury resulting from his want of skill, although he neither employed nor was to pay him. *Winterbottom v. Wright*, 10 Mee. & W. 109; s. c. 11 Law J. Rep. (N. S.) Exch. 415, will probably be relied on by the other side; but that case is distinguishable on the ground, stated by Lord Abinger, that there was neither privity of contract nor any breach of duty towards the plaintiff.

W. H. Watson, (with whom was *Webster*,) in support of the rule. It is conceded, on the authority of *Langridge v. Levy*, that, if a man sells an article with a fraudulent representation of its fitness, and knowing that it is to be used by the purchaser and a third party, and that third party is subsequently injured through its defective character, he may maintain an action for the injury he has sustained. Here, however, the jury have clearly negatived all intention of fraud on the part of the defendant; and the action, therefore, which is founded on a contract, can only be brought by the husband, on whose behalf the contract was made. The liability of a surgeon, which has been referred to, rests on a peculiar principle, and furnishes no support to the argument on the other side. A surgeon is bound to exercise due diligence and skill towards a patient, although employed by another; and, if the patient suffers in consequence of his incapacity or negligence, he has a right of action against him. But there is no duty imposed on a tradesman to furnish articles that will

Longmead & Wife v. Holliday.

be fit and proper for the use of every individual into whose hands they may come. If that doctrine were recognized, it might be carried to an indefinite extent, and be productive of the greatest injustice. For instance, if an omnibus were to break down, or a ship go to pieces, through the negligent or unworkmanlike manner in which they were constructed, every individual injured would have a right of action against their respective builders. The case cannot be distinguished from that of *Winterbottom v. Wright*, where it was held that the plaintiff could not recover damages for an injury caused by the breaking down of a coach furnished by the defendant under a contract entered into with a third person, and to which the plaintiff was not a party. This action, therefore, by the husband and wife cannot be maintained.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. His lordship stated the pleadings and facts, and continued. The case was fully argued before the lord chief baron, my brother Martin, and myself: we took time to consider, and the result of that consideration has been, that we think the rule ought to be made absolute. There is no doubt, if the defendant had been guilty of any fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intended it so to be used by the plaintiff's wife or any particular individual, that the wife, her husband being joined for conformity, or that individual, would have an action for the deceit, on the principle on which all actions for deceitful misrepresentation are founded. That was strongly illustrated in the case of *Langridge v. Levy*, namely, that if any one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit; but, the fraud being negatived in this case, the action cannot be maintained on that ground by the party who has sustained the damage. There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action although no such contract had been made; as, for example, if an apothecary administers improper medicines to his patient, or a surgeon unskilfully treats him, and thereby injures his health, he would be liable to the patient, even where the father or friend of the patient may have been the contracting party with the apothecary or the surgeon; for though no such contract had been made, the apothecary, if he gave improper medicine, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for misfeasance. *Pippin v. Sheppard*, confirmed in *Gladwell v. Steggall*. If a stage coach proprietor, who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to him; for it is a misfeasance towards him, if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards every

Jones v. Davies & others.

one travelling on the road. So, if a mason contract to erect a bridge or other work on a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible if a third person is injured by the defective construction, and he could not be saved from the consequences of his illegal act in committing the nuisance upon the highway by showing he was also guilty of a breach of contract and responsible for it; and it may be the same when any one delivers to another, without notice, an instrument in its nature dangerous under particular circumstances, as a loaded gun which he himself has loaded, and that other person to whom it is delivered is injured thereby; or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is *Dixon v. Bell*, 5 M. & S. 198. But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine not in its nature dangerous — a carriage, for instance, which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care — should be lent or given by one person, even by the person who manufactured it, to another, that the former should be answerable to the latter for a subsequent damage accruing in the use of it. Could it be contended, with justice, in the present case, if the lamp had been lent or given by the defendant to the plaintiff's wife, and used by her, he would have been answerable for the personal damage which she sustained, the defendant not knowing or having any reason to believe it was not perfectly safe, although liable to the party with whom he contracted to sell it upon an implied warranty that it was fit for use, so far as reasonable care could make it, for a breach of contract as to all damage sustained by him? We are of opinion, therefore, that, if there had been, in this case, a breach of contract with the plaintiffs, the husband might have sued for it; but there being no misfeasance towards the wife independently of the contract, she cannot sue and join herself with her husband. Therefore, a nonsuit must be entered.

Rule absolute for a nonsuit.

JONES v. DAVIES & others.¹

Trinity Term, May 29, 1851.

Trover — Pleading — Not Guilty — Denial of Property.

In trover, the plea of not guilty admits the property of the plaintiff. Therefore, evidence that the chattels had been given to the plaintiff by the defendants upon a certain condition, which had not been performed, and that the defendants retaken them, is not admissible under that plea.

Young v. Cooper, 20 Law J. Rep. (N. S.) Exch. 136; s. c. 3 Eng. Rep. 540, explained.

¹ 20 Law J. Rep. (N. S.) Exch. 433.

Jones v. Davies & others.

TROVER for cattle.

Plea— Not guilty.

At the trial before Williams, J., at the Spring assizes for the county of Cardigan, the defendant tendered evidence to show that the cattle had been given by the defendant Davies to the plaintiff on his marriage with Davies's daughter, upon the condition that the plaintiff should settle certain property upon her; that she died shortly after, and, no settlement having been made, the defendant Davies and the others retook the cattle. It was objected that this was not admissible under the plea of not guilty, but the evidence was ultimately admitted. The jury, however, returned a verdict for the plaintiff, and a rule nisi having been obtained for a new trial on the ground of surprise, —

W. R. Grove showed cause. A new trial cannot be granted, as the evidence was improperly admitted, and the facts stated in the affidavits could not alter the verdict. Not guilty clearly admits the property of the plaintiff in the goods. *Stancliffe v. Hardwicke*, 2 Cr. M. & R. 1; s. c. 4 Law J. Rep. (n. s.) Exch. 161. In *Vernon v. Ship-ton*, 2 Mee. & W. 9; s. c. 6 Law J. Rep. (n. s.) Exch. 25, the plaintiff was held entitled to succeed, although it was shown that at the time of the conversion he had no property in the goods, because not guilty was the only plea on the record. So in *Frankum v. Earl of Falmouth*, 2 Ad. & E. 452; s. c. 4 Law J. Rep. (n. s.) K. B. 26, to an action for injuriously and wrongfully diverting a watercourse, not guilty was held to admit the right to the use of the stream, and only to put in issue the fact of the diversion.

The court then called on

J. Evans and *H. Davison* to support the rule. According to the recent decision of this court in *Young v. Cooper*, 20 Law J. Rep. (n. s.) Exch. 136; s. c. 3 Eng. Rep. 540, the wrongfulness, as well as the fact of the conversion, is denied by not guilty, and evidence that the goods were the property of the plaintiff was therefore admissible. In that case, Parke, B., said, "In *Stancliffe v. Hardwicke*, we thought not guilty meant a conversion in fact, but *ex vi termini* conversion means wrongful conversion." The case of *Stancliffe v. Hardwicke* must, therefore, be considered to be overruled.

[*Martin*, B. There the plea of justification was bad, because it denied the conversion argumentatively. The effect of that decision is, that when the two pleas of not guilty and not possessed are pleaded together, they put in issue every thing that is necessary for the plaintiff to prove in an action of trover. Not guilty admits the plaintiff's property.]

According to *Young v. Cooper*, if it be correct, not guilty will suffice, for a man cannot wrongfully convert his own goods.

[*Alderson*, B. There may be some property in the defendant, and still the conversion may be wrongful, as in the case of a joint tenancy.]

Carne & Vivian v. Malins & others.

Martin, B. Throughout that case, there is an inaccuracy in the language. The plea of not guilty was treated as if it were the general issue. The plea really amounted to not possessed.

Pollock, C. B., referred to *Dorrington v. Carter*, 1 Exch. Rep. 566.]

The case was ultimately disposed of by arrangement between the parties, at the suggestion of the court.

CARNE & VIVIAN v. MALINS & others.¹

Trinity Vacation, June 28, 1851.

Amendment — Adding Plaintiffs — Limitations, Statute of.

A firm carried on business as A., B., and C. At the time of an alleged debt being contracted, B. and C. were surviving, and an action was subsequently commenced in their names. For more than three years after issue joined, negotiations were pending for a reference, which ultimately went off, and notice of trial was then given. It was then discovered that at the time of the debt being contracted eight other persons were beneficially interested in the firm. The court allowed the writ and other proceedings to be amended, by adding the names of these persons, in order to avoid the effect of the Statute of Limitations.

THIS was a rule calling on the defendants to show cause why the plaintiffs should not be at liberty to amend the writ and all subsequent proceedings by adding, as plaintiffs, the names of B. Reynolds and seven others.

It appeared from the affidavits that this was an action of *assumpsit* for a balance claimed to be due from the defendants to the plaintiffs on a balance of account ending July, 1841. The writ was issued on the 9th of July, 1846, and in February, 1847, after the defendants had pleaded the general issue, they proposed a reference, stating that they were advised to bring a cross action against the plaintiffs. The proposition was agreed to, and an arbitrator named, but owing to some difference as to the terms of the reference, the proposal was broken off in the beginning of 1850, and notice of trial was then given for the Cornwall Summer assizes in 1850, but the plaintiffs did not go to trial. It further appeared on the affidavit of the plaintiffs' attorney that the business had been carried on in the names of "Sandys, Vivian, and Carne;" but that at the time of the debt being incurred Sandys was dead, and that the action was, therefore, brought in the names of the supposed survivors. It was, however, discovered, just before the time of trial, that there were eight other persons beneficially interested in the firm at the time of the debt being contracted, and it was these persons whose names were now sought to be added as plaintiffs. It was also sworn that the Statute of Limitations would be a bar to a fresh action.

¹ 20 Law J. Rep. (N. S.) Exch. 434.

Carne & Vivian v. Makins & others.

Willes now showed cause.¹ No sufficient reason is shown for making this amendment, and the plaintiffs must suffer the consequence of their own mistake. It is not pretended that the defendant or his attorney has misled them; and the parties are suing in their own right, not in any representative capacity so as to excuse such a mistake. The number of plaintiffs sought to be added is another objection. The rule has been recently laid down by the Court of Common Pleas in *Phillips v. Lewis*, 1 L. M. & P. 156: "The view which the court take of the question is this: if there be a sufficient reason for making an amendment, the fact that the Statute of Limitations will be available if the amendment be not made is no reason for refusing to make it; but if there be no other reason for making it than that the statute will be a bar, that is not a ground upon which such an application will be granted." This is fatal to the present application.

M. Smith, in support of the rule. The application is quite within the authorities. In *Goodchild v. Leadham*, 1 Exch. Rep. 706; s. c. 17 Law J. Rep. (N. S.) Exch. 90, the court, in refusing leave to add the name of a defendant, said that they would amend process only where the penalty of the blunder would cause the loss of the entire debt, and where the writ by mistake differed from the *præcipe*. Upon the first of these reasons, amendments were made in *Horton v. The Inhabitants of Stamford*, 1 Cr. & M. 773; s. c. 2 Law J. Rep. (N. S.) Exch. 274. *Lakin v. Massie*, 2 Ibid. 685; s. c. 3 Law J. Rep. (N. S.) Exch. 203. *Christie v. Bell*, 16 Mee. & W. 669; s. c. 16 Law J. Rep. (N. S.) Exch. 179. In *Crawford v. Cocks*, 20 Law J. Rep. (N. S.) Exch. 169; s. c. 3 Eng. Rep. 594, the names of two defendants who had been erroneously joined were allowed to be struck out.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. The court having considered the authorities on the subject, and the serious consequences which would follow to the plaintiffs if the application were refused, are of opinion that the amendment should be allowed.

*Rule absolute.*²

¹ May 13, before POLLOCK, C. B., PARKE, PLATT, and MARTIN, BB.

² The rule was drawn up on payment of costs; the defendants to be at liberty to pay the debt in ten days, and thereupon to be entitled to the costs of the action, and to be deducted then from the debt: if the defendants should bring a cross action in respect of the same transactions, the plaintiffs are not to plead the Statute of Limitations.

Adcock v. Wood.

ADCOCK v. WOOD.¹

Trinity Vacation, February 14, and July 1, 1851.

Arbitration — Nul tiel Agard — Matters in Difference — Payment to a third Party.

Where all differences between A. on the one side, and B. and C. on the other, are referred, the arbitrator may award as to differences which A. has with B. or C. severally as well as those which he has with them jointly.

A direction in an award that one party shall pay money to a stranger is good, if it does not appear impossible that such payment can be for the benefit of a party to the award.

A declaration in *assumpsit* upon an award, after stating that differences had arisen between the plaintiff, on the one part, and the defendant and one S. A., on the other, alleged that it was agreed between the plaintiff, the defendant, and S. A. mutually and reciprocally to refer the same differences to T. S. and W. I., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150*l.* 18*s.* 6*d.* to T. S., who should immediately pay it to the plaintiff.

Plea, that T. S. and W. I. did not make their award concerning the matters in difference referred to them, *modo et forma* :—

Held, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue :—

Held, also, that the declaration was good in arrest of judgment, as it sufficiently appeared, first, that the arbitrator had power to award upon differences between A., on the one side, and B. and C. severally, on the other; and, secondly, that the direction to pay the money to the arbitrator was for the benefit of the plaintiff.

ASSUMPSIT upon an award. The declaration stated, that whereas, before and at the time of the making of the agreement hereinafter mentioned, certain disputes and differences had arisen and were depending between the plaintiff, on the one part, and the defendant and one Sharples Adcock, on the other part, and thereupon heretofore, to wit, on the 4th of September, 1849, by a certain agreement in writing then made by and between the plaintiff and the defendant and Sharples Adcock for the finally settling such differences, it was agreed by and between the plaintiff and the defendant and Sharples Adcock mutually and reciprocally that the said disputes and differences between them the said parties should be and the same were thereby referred to the final award and determination of one Thomas Sharpe and one William Inett, arbitrators chosen by and between the said parties. After averring mutual promises, the declaration then stated that the said Thomas Sharpe and William Inett took upon themselves the burden of the said arbitration; and afterwards, to wit, &c., made and published their award, in writing, of and concerning the said matters in difference, so referred as aforesaid, ready to be delivered to the said parties, and did thereby award, order, and direct the defendant, within one month from the date thereof, to pay to the said Thomas Sharpe the sum of 150*l.* 18*s.* 6*d.*; and did further order and direct that the said sum should be, immediately upon the receipt thereof, paid by the said Thomas Sharpe to the plaintiff, of which

¹ 20 Law J. Rep. (N. S.) Exch. 435.

Adcock v. Wood.

said award the defendant afterwards, to wit, &c., had notice. Yet the defendant, although often requested so to do, hath not paid either to the said Thomas Sharpe or to the plaintiff the said sum of 150*l.* 18*s.* 6*d.*, or any part thereof, although the time for the payment thereof hath long since elapsed, and the same is now due and unpaid.

The defendant pleaded, first, *non assumpsit*; secondly, that the said Thomas Sharpe and William Inett did not make and publish their said award of and concerning the matters in difference referred to them, *modo et forma*. Issues thereon.

On the trial, before Platt, B., at the Leicester Summer assizes for 1850, it appeared that the submission was in these terms: *Wood and S. Adcock v. Thomas Adcock*. There having been disputes arisen between the above parties, it was mutually agreed between the said parties that the said disputes and differences should be settled by arbitration. It is therefore agreed that Mr. Thomas Sharpe, of Kinoulton, in the county of Nottingham, be appointed on the part of Messrs. Wood and Sharples Adcock, and William Inett, of Ashfordly, in the county of Leicester, on the part of the said Thomas Adcock; and if they are unable to settle the said disputes, the said arbitrators, Thomas Sharpe and William Inett, are to name a third person before entering into the business, and the evidence of each party is to be taken on oath." A third person as umpire was duly nominated. The award was put in, and was as follows: "An arbitration between Messrs. Wood and Adcock, on the one part, and Thomas Adcock, on the other part, commencing on the 1st of October, 1849, and completed on the 12th of February, 1850.

"Disputes having arisen between the above-named parties relative to a running account commencing in 1845, and ending in 1849, we, the undersigned, were deputed by the above-named Messrs. Wood & Adcock and Thomas Adcock to settle all matters of dispute between them. After a due and careful investigation of the whole of the evidence, we finally awarded the sum of 150*l.* 18*s.* 6*d.* to be paid by Mr. Wood, on the part of Messrs. Wood & Adcock, to Mr. Thomas Sharpe, of Kinoulton, as their arbitrator, within one month from the date hereof, and that the said sum of 150*l.* 18*s.* 6*d.* be paid by the said Thomas Sharpe immediately to the said Thomas Adcock, and that each party pay his or their own arbitrator half the expenses incurred at the Bell and Swan Hotel, Melton Mowbray, and half the stamp for the arbitration." Signed by the arbitrators.

It was then objected, on the part of the defendant, that there was a variance between the promise as laid and the submission, and also that the award was bad and the defence open under the second plea. His lordship thereupon nonsuited the plaintiff, reserving leave to move to enter a verdict for him for 150*l.* damages. A rule had accordingly been obtained, against which

Whitehurst and *Hayes* showed cause.¹ The submission is stated to

¹ December 7, before PARKER, PLATT, and MARTIN, BB.

Adcock v. Wood.

ADCOCK v. WOOD.¹

Trinity Vacation, February 14, and July 1, 1851.

Arbitration — Nul tiel Agard — Matters in Difference — Payment to a third Party.

Where all differences between A. on the one side, and B. and C. on the other, are referred, the arbitrator may award as to differences which A. has with B. or C. severally as well as those which he has with them jointly.

A direction in an award that one party shall pay money to a stranger is good, if it does not appear impossible that such payment can be for the benefit of a party to the award.

A declaration in *assumpsit* upon an award, after stating that differences had arisen between the plaintiff, on the one part, and the defendant and one S. A., on the other, alleged that it was agreed between the plaintiff, the defendant, and S. A. mutually and reciprocally to refer the same differences to T. S. and W. I., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150*l.* 18*s.* 6*d.* to T. S., who should immediately pay it to the plaintiff.

Plea, that T. S. and W. I. did not make their award concerning the matters in difference referred to them, *modo et forma*: —

Held, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue: —

Held, also, that the declaration was good in arrest of judgment, as it sufficiently appeared, first, that the arbitrator had power to award upon differences between A., on the one side, and B. and C. severally, on the other; and, secondly, that the direction to pay the money to the arbitrator was for the benefit of the plaintiff.

ASSUMPSIT upon an award. The declaration stated, that whereas, before and at the time of the making of the agreement hereinafter mentioned, certain disputes and differences had arisen and were depending between the plaintiff, on the one part, and the defendant and one Sharples Adcock, on the other part, and thereupon heretofore, to wit, on the 4th of September, 1849, by a certain agreement in writing then made by and between the plaintiff and the defendant and Sharples Adcock for the finally settling such differences, it was agreed by and between the plaintiff and the defendant and Sharples Adcock mutually and reciprocally that the said disputes and differences between them the said parties should be and the same were thereby referred to the final award and determination of one Thomas Sharpe and one William Inett, arbitrators chosen by and between the said parties. After averring mutual promises, the declaration then stated that the said Thomas Sharpe and William Inett took upon themselves the burden of the said arbitration; and afterwards, to wit, &c., made and published their award, in writing, of and concerning the said matters in difference, so referred as aforesaid, ready to be delivered to the said parties, and did thereby award, order, and direct the defendant, within one month from the date thereof, to pay to the said Thomas Sharpe the sum of 150*l.* 18*s.* 6*d.*; and did further order and direct that the said sum should be, immediately upon the receipt thereof, paid by the said Thomas Sharpe to the plaintiff, of which

¹ 20 Law J. Rep. (N. S.) Exch. 435.

Adcock v. Wood.

the defendant, that this plea put in issue not merely the fact of the making of such award, and that it was made of and concerning the said matters in difference, but that it was a valid award on the face of it; and that this award was bad. For the plaintiff, it was argued, that the plea only put in issue the award alleged as being made of and concerning the premises, and not the validity of the award on the face of it; and if it did, the award was on the face of it good. We think the plea in this case merely puts in issue the fact of an award "of and concerning the matters in difference in manner and form alleged," and not the validity of that award on the face of it, and that the latter is matter of law on the record. The authorities cited on the argument do not show the contrary. Where there is a plea of "no award," not by way of answer to a declaration upon an award, but by way of answer to an action on a bond with a condition to abide by the award, the plea means that there was no good award, and if the replication sets out the award in part, it is no departure to rejoin that there was an award, setting it out fully, and thereby showing the award was bad on the face of it. This is the case of *Fisher v. Pimbley*. In that case, Bayley, J., said, the defendant could not have taken issue upon the allegation of the award in the replication, because there was such an award as there stated. Where the plea of *nul tiel agard* is pleaded in an action on an award averring the award to be made of and concerning the premises, it puts in issue the fact of the award being made of and concerning the premises, that is on all the matters referred. That is *Dresser v. Stansfeld*; but if the award, as set out upon the face of it, be bad, it does not raise that question to be decided by the jury. The objections on the face of the award are for the court on demurrer, or in arrest of judgment. In this case, we are of opinion that, the only real question on the issue of *nul tiel agard* being whether the award was made in the form alleged, and presumably on all the matters in difference till the contrary was shown, the issue ought to have been found for the plaintiff, notwithstanding the objections arising on the face of the award. It was taken on the trial that there was no matter referred which the arbitrators did not adjudicate upon. Whether, when the verdict is entered, as it must be, for the plaintiff on the whole record, the objection to the award will be held good, we cannot now decide. Leave was reserved to the defendant to move in arrest of judgment. He may move on the first day of next term, and the final judgment on this matter will be suspended until that motion is made.

Verdict entered for the plaintiff.

In Easter term, a rule was obtained accordingly, by

Whitehurst, to arrest the judgment, on the ground that the arbitrators were not authorized to direct payment of the sum in question by Wood on the part of Messrs. Wood & Adcock, the reference having been of differences between Thomas Adcock and Wood and Sharples Adcock as partners, and because the payment was awarded to a stranger. Against this rule

Adcock v. Wood.

Macaulay and *Mellor* showed cause.¹ This declaration is good, if under any circumstances the arbitrators would have been justified in making such an award. But a submission by A. and B. on the one part, and C. and D. on the other, of all matters in difference between them, imports a submission of all disputes that any one of them had against the others jointly or severally. *Watson on Awards*, pp. 15, 16, 182, where *Athelstone v. Moon*, Com. Rep. 547, *Baspole's Case*, 8 Rep. 97, and other cases are cited. In *Rees v. Waters*, 16 Mee. & W. 263, indeed, the lord chief baron intimated that in his opinion there was a distinction between a reference at *nisi prius* and the act of the parties, and that under an order of *nisi prius*, if the words "or any or either of them" were omitted, there was not the power to decide upon any but joint differences; but Parke, B., said, many authorities show that "between the parties" means between the parties "or any of them." Here the statement is, that they mutually and reciprocally agreed. The award here made might be quite correct, as if it was a correction of tort, and one was found to have taken no part in the transaction, or it might have been a question of principal and surety. *Genne v. Tinker*, 3 Lev. 24, and the judgment of Richardson, C. B., in *Winter v. White*, 1 Brod. & B. 350, were also referred to. As to the second objection, it may reasonably be intended that Thomas Sharpe is not a stranger: at any rate, the money is not received by him for his own benefit. He is a trustee for the plaintiff, and the direction for payment is valid. *Snook v. Hellyer*, 2 Chit. Rep. 43. Com. Dig. tit. "Arbitrament," E, 7. *Dale v. Mottram*, 2 Barnard. 291.

[*Platt*, B., referred to *Bird v. Bird*, 1 Salk. 74.]

In *In re Mackay*, 2 Ad. & E. 356, the award was held bad, because it ordered payments to be made to the arbitrator, over whom there could be no control; and also because the money was left subject to equities arising out of the very partnership disputes which should have been finally disposed of by the award. It might have been the very question in dispute whether the defendant or the plaintiff should pay Sharpe.

Hayes and *H. Hill*, in support of the rule. This case is distinguishable from *White v. Winter*, in which there were joint and several bonds. Here is a joint obligation only. The omission of the words "any of the parties" is material. If there were any separate differences, they should have been specified in the submission, whereas here the recital of the existence of disputes between the plaintiff on the one part, and the defendant and Sharples Adcock on the other, impliedly negatives any such separate disputes. In *Bean v. Newbury*, 1 Lev. 139, where the submission was between A. and B. on one part, and C. on the other, an award between B. and C. only was held bad. To hold that any separate differences might be adjudicated upon would be to alter the agreement of the parties. Suppose the award had been that the plaintiff should pay the debt, the defendant

¹ June 13, before POLLOCK, C. B., ALDERSON, PLATT, and MARTIN, BB.

 Adcock v. Wood.

could not have sued alone. The award is also bad for ordering this money to be paid to Sharpe. Suppose Sharpe does not give the plaintiff the money, what remedy would there be against him? Would the defendant be discharged? It is the same as the case of *In re Mackay*, for it must be here taken that Thomas Sharpe is the arbitrator, and an arbitrator cannot award payment to himself. *Robinson v. Henderson*, 6 M. & S. 277.

Cur. adv. vult.

Judgment was now delivered by

ALDERSON, B. In order to succeed on this rule, it is clear the defendant must be able to show that on the facts stated in the declaration in this case the award necessarily must be bad; but that cannot be established in this case. The facts are these. [His lordship stated that portion of the declaration which contain the agreement of submission, and the commencement of the award, and then continued as follows.] The declaration then states that the arbitrators undertook the reference, and made their award of and concerning the matters in difference, and awarded and directed the defendant, within one month of the date thereof, to pay to Thomas Sharpe the sum of 150*l.* 18*s.* 6*d.*; and did further order and direct that the same should be, immediately on receipt thereof, paid by Thomas Sharpe to the plaintiff, of which said award the defendant afterwards had notice. The question, therefore, is, whether or not that is a bad award necessarily on the face of it. It is clear that on a reference of all differences between A. on one side, and B. and C. on the other, differences between A., B., and C. jointly, or differences between A., B., and C. severally, may be settled by the arbitrators. That is stated in Mr. Watson's Book on Awards, p. 182, and pp. 15 and 16, and the authorities clearly establish that proposition. The award, therefore, that one of two shall pay is good in an action between A. on one side, and B. and C. on the other. But here the award is to pay money, as it is said, to a third person; that is to say, it is to be paid by the defendant to Thomas Sharpe. An award, however, to pay money to a stranger would be good if it did not appear impossible that such payment could be to the advantage of the other party to the arbitration. That is laid down in Com. Dig. tit. "Arbitrament," E, 7; 1 Salk. 74. If the contrary does not appear, it shall be intended to be for their benefit. Now, in this case, instead of the contrary appearing, it appears affirmatively that it is for the party's advantage that the money should be paid to a stranger, for the money is ordered to be paid to Mr. Thomas Sharpe, in order that the said Thomas Sharpe may immediately pay it over to the plaintiff himself. Then, it is perfectly clear in this case that it is for the advantage of the party in favor of whom the award is made. We, therefore, think that the defendant has failed to establish his proposition; that, at all events, this award must be bad; and, therefore, the rule for arresting the judgment must be discharged.

Rule discharged.

Alhusen v. Prest & another.

ALHUSEN v. PREST & another.¹

Trinity Term, May 31, 1851.

Pleading — Bankruptcy — Withdrawal of Summons, Meaning of.

ASSUMPSIT. The declaration stated that before, &c., one W. was indebted to the plaintiff in 236*l.* 14*s.*; that the plaintiff, according to the provisions of the Bankrupt Law Consolidation Act, 1849, had filed an affidavit in bankruptcy against W., and had caused a summons to be issued out of the Court of Bankruptcy, by which W. was required to appear before the said court, for the purpose of ascertaining whether he admitted the plaintiff's demand or had a good defence; and which summons was pending at the time of the defendants' promise, and capable of being enforced; that, in consideration that the plaintiff would withdraw the said summons out of the court, the defendants promised and guarantied to pay the plaintiff the sum of 236*l.* 14*s.* Averment, that the plaintiff withdrew the summons out of the Court of Bankruptcy, of which the defendants had notice. Breach, non-payment of the 236*l.* 14*s.* Plea, that the defendants had not notice that the plaintiff had withdrawn the summons:—

Held, on general demurrer, that the words "withdraw the summons" meant the taking some step whereby W. might be exonerated from attending the court, which must be by making some communication to him on the part of the plaintiff; or that it meant the taking some step in the Court of Bankruptcy; in either of which cases notice was not necessary, and, therefore, that the plea was bad.

ASSUMPSIT. The declaration stated "that before and at, &c., one G. E. Waterton was indebted to the plaintiff in the sum of 236*l.* 14*s.*, and that, to wit, on the 5th of December, 1849, the plaintiff, for the recovery of the said debt, had commenced an action against G. E. Waterton in this court, and the action was depending at the time of the making of the said promise of the defendants; and whereas, also, whilst the said G. E. Waterton was indebted as aforesaid, the plaintiff, according to the provisions of the Bankrupt Law Consolidation Act, 1849," filed an affidavit in the Court of Bankruptcy for the Leeds district, and thereupon caused a summons to be issued out of the said court, by which summons the said G. E. Waterton was required personally to appear before the said court at Leeds, to ascertain whether or not he admitted the demand of the plaintiff of 220*l.* 12*s.* 5*d.*, or whether he believed that he had a good defence upon the merits, and which summons was still pending and capable of being enforced by the plaintiff against G. E. Waterton, at the time of the making of the promise of the defendants, of all which premises the defendants, before and at, &c., had notice, and thereupon, to wit, on the 19th of December, 1849, in consideration that the plaintiff, at the request of the defendants, would not proceed in the said action, and would *withdraw the said summons* against G. E. Waterton out of the said court, they, the defendants, promised and guarantied to the plaintiff to pay him the sum of 236*l.* 14*s.*, being the debt then due from G. E. Waterton, with interest. Averment that the plaintiff has not since taken any proceedings in the said action, and within a reasonable time, and before the expiration of the said period of six months, to wit, on the 19th of December, 1849, withdrew the said

¹ 20 LAW J. REP. (N. S.) EXCH. 440.

Alhusen v. Prest & another.

summons against G. E. Waterton out of the said court, of all which said premises the defendants have always had notice. Breach, non-payment of the sum of 236*l.* 14*s.*

Plea — That the defendants did not, within six months from the 19th of December, 1849, have notice that the plaintiff had withdrawn the summons out of the said court *modo et forma*. Conclusion to the country.

General demurrer.

Cowling, in support of the demurrer. This plea is bad in law. The question turns upon the meaning of the words "withdraw the summons." It is submitted that those words mean an application to the Court of Bankruptcy to allow the matter to be withdrawn. If that be the meaning of the words, then no notice was necessary. The contract contained no express stipulation that notice should be given.

[*Parke, B.* The question turns upon the meaning of the words "withdraw the summons." If they mean an election by the plaintiff not to proceed further in the cause, then, that being a matter within the knowledge of the plaintiff, notice of it ought to have been given to the defendants, and the plea is good.]

It was intended that the creditor should be in the same situation as if no summons had issued; but whatever be the meaning of the words, the plaintiff contends that he has done all that was necessary. Secondly, the averment of notice may be struck out, and yet the declaration would be good. The defendants have promised to pay a sum of money on a specific day, and the giving of notice is not a condition precedent to their liability to pay it.

Crompton, in support of the plea. The defendants were not bound to pay the money until the summons was withdrawn, and they were entitled to have notice of the withdrawal. *Vyse v. Wakefield*, 6 Mee. & W. 442; s. c. 9 Law J. Rep. (N. S.) Exch. 274, is in point. There the declaration stated that the defendant covenanted that he would appear at an insurance office, and answer questions to enable the plaintiff to insure the defendant's life, and would not do any act to avoid the insurance; that the defendant appeared at the insurance office, and answered questions; that the plaintiff insured the defendant's life by a policy which provided that if the defendant went beyond the limits of Europe the policy should be void. Breach, that the defendant did go beyond the limits of Europe. The declaration was held to be bad in not averring that the defendant had notice that the policy was effected. The rule seems to be, that if the matter rests in the breast of the plaintiff, or lies within his option, then the plaintiff must give notice. So, if the plaintiff may effect his object in two or three different modes, he must give notice. The plaintiff had a long time in which to withdraw this summons. Surely the defendant was not bound to attend from day to day at the Court of Bankruptcy, to ascertain whether the summons had or had not been withdrawn.

Alhusen v. Frost & another.

Cowling, in reply. The rule applicable to this case is laid down in Com. Dig. tit. "Condition," L, 8. "So, if a condition be to do a thing upon the performance of an act by the feoffee or obligee, which is secret, and lies only in his breast, the performance of the condition is excused till the feoffee or obligee gives notice that he has performed the first act."

The case stood over for some time to enable the parties to agree upon some amendment; but none having been made, —

The judgment of the court was now pronounced by

POLLOCK, C. B. [After stating the pleadings, his lordship proceeded.] The parties in this case having been unable to agree upon any amendment, it was suggested, at the time of the argument, that there was some doubt with respect to the declaration, and some doubt with respect to the plea, and the parties agreed mutually to have the opinion of the court. Accordingly, I have now to state what the judgment, in our opinion, ought to be. The question in the case turns altogether on the meaning of the words "withdraw the summons" against the said G. E. Waterton, out of the said district Court of Bankruptcy. Probably the precise words are those of the memorandum of guaranty. The meaning of those precise words is what we have now to settle with reference to the present plea. If the meaning is, that the plaintiff shall make up his mind or elect simply not any further to pursue his remedy by summons, notice ought to be given by the plaintiff to the defendants of that election, on the principle laid down in Com. Dig. tit. "Pleader," C, 73, and the averment of notice was material and traversable. If the meaning is, that the plaintiff shall take some steps in the Court of Bankruptcy to indicate that the proceeding is abandoned, in the nature of a *nolle prosequi* by motion in the court, or any entry on its proceedings, as analogous to the performance of an agreement by an obligee to a third person, then no notice is necessary, and the averment of it, therefore, is idle and superfluous. Or, if no proceeding in court was intended to take place, but the meaning was, that the plaintiff should inform the debtor, Waterton, that he need not attend the summons, then, also, no notice was necessary, upon the same principle. We think the meaning of the parties could not be that there was any proceeding in the court to take place. The words "summons against the said G. E. Waterton" mean to describe the summons as one issued out of the court, not that the summons was to be withdrawn out of the court. But of the two other constructions, the latter seems to us to be the most probable. To withdraw the summons, we think, must mean to take some steps whereby the debtor, Waterton, may be exonerated from attending, and that must be by making some communication to him on the part of the plaintiff; at any rate, it must be by that or by some step in the court; in either of which cases we think no notice was necessary, and, therefore, there will be judgment for the plaintiff.

Judgment for the plaintiff.

Ex parte Brunswick and Luneburgh; in re The Recognizances of Lowe, &c.

Ex parte BRUNSWICK AND LUNEBURGH; *in re* The Recognizances of LOWE AND CLEMENTS, Sureties of GHISLIN.¹

Hilary Term, January 11, 1851.

Scire Facias — Recognizance — Fiat of Attorney General.

Writs of execution having been sued out without effect on a judgment against the publisher of a newspaper for libel, the court allowed a *sci. fa.* to issue on the recognizance of the sureties taken under the 60 Geo. 3, c. 9, and 1 Will. 4, c. 73, the attorney general's fiat having been first obtained.

THIS was a rule calling on the attorney general, and William Lowe and John Clements, to show cause why a writ of *sci. fa.* should not issue against the said W. Lowe and J. Clements, upon the recognizance entered into by them as sureties for W. Ghislin.

It appeared by the affidavits, that in February, 1844, W. Ghislin, who was the publisher of the "Satirist" newspaper, in pursuance of the 60 Geo. 3, c. 9, and 1 Will. 4, c. 73, entered into a recognizance in the sum of 400*l.*; at the same time, and in pursuance of those statutes, W. Lowe and J. Clements, as his sureties, also entered into a recognizance in the like amount, conditioned as follows: "That if the said W. Ghislin did and should well and truly pay or cause to be paid unto her majesty, her heirs, or successors, every such fine or penalty as should or might be imposed upon or adjudged against the said W. Ghislin, by reason of any conviction for printing or publishing any blasphemous or seditious libel at any time thereafter, and if the said W. Ghislin, his heirs, &c., did and should well and truly pay or cause to be paid unto the person or persons respectively who should recover the same all damages and costs which should be by such person or persons respectively recovered in any action or actions against the said W. Ghislin, by reason of any libel or libels contained or published in any newspaper, then the said recognizances to be void, or else the same to remain in full force and virtue." In Trinity term, 1848, the Duke of Brunswick obtained a verdict with 1500*l.* damages in an action against W. Ghislin for a libel published in the "Satirist" newspaper, and final judgment was afterwards signed for damages and costs amounting to 1760*l.* Writs of *fi. fa.* and *ca. sa.* had issued, but without effect, as W. Ghislin had disposed of his property, and left the country. The recognizances were returned into the exchequer, and filed with the Queen's Remembrancer there.

Knowles, for W. Lowe and J. Clements, showed cause in last Trinity term, (June 12.²) The court has no power to grant this application. The 60 Geo. 3, c. 9, s. 8, prohibits any person from publishing a newspaper until he shall have entered into a recognizance or bond in the sum of 300*l.*, conditioned for payment to his majesty of every fine or penalty imposed upon or adjudged against

¹ 6 Exch. Rep. 22.

² Before POLLOCK, C. B., ALDERSON, ROLFE, and PLATT, BB.

Ex parte Brunswick and Laneburgh; in re The Recognizances of Lowe, &c.

him for printing or publishing any blasphemous or seditious libel. The 1 Will. 4, c. 73, s. 2, extends the amount of the recognizance or bond to 400*l.*, and declares "that the conditions of such new recognizances and bonds respectively shall extend to secure the payment of damages and costs to be recovered in actions for libels published in such newspapers," &c., as well as to secure the payment of fines upon convictions. Sect. 3 enacts, "That if any plaintiff in any action for libel against any *editor, conductor, or proprietor* of such newspaper, &c., shall make it appear by affidavit to his majesty's Court of Exchequer that he is entitled to have execution against the defendant upon any judgment in such action, but that he has not been able to procure satisfaction by writ of execution against the goods and chattels of such defendant, it shall be lawful for the said court, for the benefit of such plaintiff, to order and direct such proceedings to be had and taken upon such recognizances or bonds respectively as would be taken to obtain any fines or penalties due to his majesty secured by such recognizance and bond: Provided always, that the expense of such proceedings shall be exclusively borne by the plaintiff as aforesaid." This case is not within that enactment, for here the judgment is against the *publisher* of the newspaper; *Ex parte The Duke of Brunswick*, 3 Exch. 829; and, therefore, the plaintiff seeks to proceed by *sci. fa.*, which is a peculiar remedy. Manning's Exchequer Prac. 136. But by the 1 Will. 4, c. 73, s. 2, "all the clauses and provisions in the 60 Geo. 3, c. 9, relating to recognizances and bonds therein mentioned, shall be applicable and extend to such new recognizances and bonds as are herein directed to be taken and made." And the 22d section of the 60 Geo. 3, c. 9, enacts, that it shall not be lawful for any person whatsoever to commence any action against any person for the recovery "of any fine, penalty, or forfeiture, made or incurred by virtue of that act," unless in the name of the attorney general. The word "forfeiture" can have no meaning unless it applies to a forfeited recognizance, and, consequently, the attorney general only can enforce this recognizance.

The court then called on

Udall and *Gray* to support the rule. The 1 Will. 4, c. 73, s. 2, confers on the subject a right to enforce these recognizances, in order to obtain payment of his damages and costs.

[*Pollock*; C. B. That section means, that the recognizances shall extend to secure the payment of damages and costs recoverable in manner thereafter provided. Then comes the 3d section, which only mentions plaintiffs in actions for libel "against any editor, conductor, or proprietor of such newspaper." If it be construed to apply to a "publisher," it would equally apply to any one who sent a libel to the newspaper.]

The intention was to give the court a complete control over these securities, without applying to the lords of the treasury. The *sci. fa.* is not for the purpose of giving validity to the recognizance, but

Leech v. Clabburn.

of enforcing that which the parties have entered into as a matter of contract. In *Rex v. Eyres*, 4 Burr. 2118, writs of *sci. fa.* and *le. fa.* had issued; and on application made to tax the prosecutor's costs, it was objected, that it was the king's money; but Lord Mansfield ordered the costs to be taxed, saying, "The king has no interest in this money; he is only royal trustee of the party." This case is analogous to that of a *sci. fa.* on a recognizance for good behavior. *Corner's Crown Prac.* 252. The term "forfeiture" in the 22d section of the 60 Geo. 3, c. 9, means the forfeitures mentioned in the 4th, 5th, and 15th sections, and which, by the 17th section, are recoverable before two justices.

Cur. adv. vult.

In the course of Michaelmas term, the case was again reargued;¹ and Parke, B., expressed an opinion that the writ ought to issue; but, other members of the court not concurring, the rule was now made absolute, the fiat of the attorney general having been obtained.

Rule absolute accordingly.

LEECH v. CLABBURN.²

Michaelmas Term, November 22, 1851.

Appearance sec. stat. — Infant.

Where an appearance *sec. stat.* was entered for an infant defendant, the court, on application made more than four days after service of the notice of declaration, set aside the appearance and all subsequent proceedings *without costs*, the defendant undertaking to appear regularly by guardian within four days.

LUSH, on the 11th of November, obtained a rule to set aside, with costs, the appearance *sec. stat.* which had been entered in this case. The writ of summons was issued on the 20th of October, 1851, and served the next day; to which the defendant not having appeared, an appearance *sec. stat.* was entered for him by the plaintiff on the 29th, and notice of declaration served on the 30th. The objection now taken was, that, the defendant being an infant, an appearance *sec. stat.* could not be entered for him.

Reed showed cause. This application was made too late. The objection, if it be one, is only an irregularity, which has been waived by the delay from the 30th of October to the 11th of November. In 1 Chit. Arch. Prac. 169, the practice is stated thus: "If an irregular appearance has been entered by the plaintiff for the defendant, the defendant must apply within four days after service of the notice of declaration." *Strange v. Freeman*, 5 Dowl. 407, and *Alsager v.*

¹ Before POLLOCK, C. B., PARKE, ALDERSON, and PLATT, BB.

² 15 Jur. 1064.

Leech v. Clabburn.

Crisp, 9 Dowl. 353, are express authorities that an appearance improperly entered for a defendant is not a nullity, but an irregularity, and, consequently, may be waived by delay. The case of *Numm v. Curtis*, 4 Dowl. 729, seems, however, to show that it is not even an irregularity, and establishes that at all events it will not be set aside *with costs*.

[*Parke*, B. *Alsager v. Crisp* was not the case of an infant. The plaintiff could gain nothing by this appearance, for, where an infant appears otherwise than by guardian, all the proceedings may be set aside on error.]

Lush, in support of the rule. The appearance is clearly an irregularity, as all subsequent proceedings founded on it would be of no value. *Numm v. Curtis* is expressly in point, and is even stronger than the present case, for there the objection was taken after judgment by default had been signed.

[*Pollock*, C. B. The *appearance* was not set aside in that case, though the subsequent proceedings were.]

That must be a mistake in the report.

[*Alderson*, B. In that case, the court gave no costs, and we had better follow their example. How could the opposite party know the age of your client?]

Per curiam. Let the rule be absolute to set aside the appearance and all subsequent proceedings *without costs*, the defendant undertaking to appear regularly by guardian within four days.

Rule absolute accordingly.

CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

DOCTORS' COMMONS;

DURING THE YEAR 1851.

Prerogative Court.

In the Goods of SAVORY.¹

November 7, 1851.

1 *Vict. c. 26, s. 9 — Execution by Testator's Initials.*

THE solicitor of the deceased, being aware of her infirm state of health, prepared the attestation clause, reciting that she had executed the will by making her mark. The deceased, however, wrote her initials in the presence of two witnesses, who duly attested, and subscribed their names. The will, so executed, was shown to the solicitor, who, fearing the execution might not be within the words of the attestation clause, desired the witnesses to return with it at once to the deceased, that she might make her mark thereon. The witnesses accordingly returned, and the deceased made her mark in their presence, just above her initials. One witness wrote part of his name, but, as there was no more ink in the pen, the other witness merely traced over his name.

Deane moved for probate, the execution by initials being clearly within the 9th section.

SIR H. JENNER FUST. The only difficulty in the case arises from the doubt and over care of the solicitor. The second execution fails; but the first is quite sufficient, and upon that the paper is entitled to probate.

¹ 15 Jur. 1042.

In the Goods of Dendy.

Prerogative Court.

In the Goods of DENDY.¹

November 7, 1851.

1 Vict. c. 26, s. 20, 22 — *Revocation — Revival.*

A. D. left a will and four codicils. The first codicil substituted legacies of stock for money legacies; the second revoked the appointment of an executor and trustee, and named another person as executor and trustee in his place; the third gave legacies to the executors and trustees appointed by the will and second codicil; the fourth directed the sale, by the executors and trustees named in the will, of an estate devised by the will, and the investment of the proceeds, upon certain trusts, and ratified and confirmed the will in every respect, except as revoked and altered by the first codicil:—

Held, that the will and the first and fourth codicils only were entitled to probate.

ARTHUR DENDY made his will, with four codicils thereto, bearing date respectively as follows: The will, 30th of May, 1846; first codicil, 22d of May, 1847; second codicil, 7th of September, 1848; third codicil, 7th of September, 1848; fourth codicil, 19th of February, 1849. The testator, by his will, devised all his copyhold messuages and premises, held of the manor of Dorking, in the county of Surrey, (except a small portion therein described,) to his son, the Rev. Samuel Dendy, absolutely, and devised all the residue of his real estate and the residue of his personal estate to the said Samuel Dendy, W. Stevens, and A. H. Dendy, upon certain trusts therein mentioned, and appointed them executors. By the first codicil he revoked four legacies of 3000*l.* sterling, bequeathed by the will to or for the benefit of his four daughters, and substituted four legacies of 3000*l.* stock, 3*l.* per cent. consols, in lieu thereof. The will and this first codicil were both prepared by the testator's solicitor. On the 15th of February, 1849, the testator called at this gentleman's office at Dorking, and told him he wished him to prepare a further codicil to his will, as he had, since he had executed his will, made a provision for his son, the said Rev. Samuel Dendy, and that it was his intention that the copyhold estate and premises held of the manor of Dorking, and specifically devised by the will to his said son, should be sold and disposed of, and the money arising therefrom laid out in the purchase of real estate, to be settled and assured in the same manner as the residue of his real estate was settled and assured by his said will, or to that effect. These instructions, to the best of the solicitor's recollection and belief, were not written down, nor did the testator give him any written directions whatever, but the drafts or copies of the said deceased's will and first codicil being in his (the solicitor's) possession, he referred to them, and from the deceased's verbal instructions prepared the codicil dated the 19th of February, 1849, which purported to revoke the devise contained in the will of the copyhold estate to the testator's son, and to direct the said Samuel Dendy, William

¹ 15 Jur. 1042.

In the Goods of Dendy.

Stevens, and Arthur Hyde Dendy (the trustees named in the said will) to sell the same, and invest the proceeds thereof in the purchase of real estate, to be settled and assured in the same manner as the freehold hereditaments given and devised by the said will, and to ratify and confirm the said will in every respect, except where the same was revoked and altered by the codicil dated the 22d of May, 1847, (the first codicil,) and the codicil now referred to. On the 19th of February, this said codicil was read over to the testator, who expressed himself perfectly satisfied therewith, and thereupon duly executed it; but the testator never, either when he gave instructions for the said codicil, or at the time he executed it, or upon any other occasion whatever, mentioned or intimated to his solicitor that he had executed any other testamentary paper than his said will and the said two codicils thereto, or that he had altered the appointment of executors as contained in his will, or any thing to that effect; and the existence of either of the two intermediate codicils, the second and third, was not discovered until after the testator's death. The second codicil purported to revoke the will so far as Mr. A. H. Dendy was an object thereof, and to substitute H. F. Napper in his place, as one of the trustees and executors of the said will; and the third codicil purported to bequeath to W. Stevens, Esq., and H. F. Napper, Esq., 50*l.* each. Both these codicils were in the testator's own handwriting, and were found on the day of the funeral by the said Rev. Samuel Dendy and Arthur Hyde Dendy, with the will and the two other codicils, in an iron chest belonging to the deceased, where he kept some of his papers of moment, the said will and three codicils being all together in one unsealed envelope, the fourth codicil being sealed up in an envelope by itself.

Addams applied for probate of the will and four codicils. The fourth codicil did not, within the meaning of the 20th section of the Wills Act, declare an intention to revoke the second and third codicils, or either of them, and, therefore, did not, within the meaning of the 22d section, show an intention to revive that part of the will which was revoked by the second codicil. What instruments the testator meant to operate as and compose his will must be gathered from the circumstances of the case. *Greenhough v. Martin*, 2 Add. 239. Here there can be no doubt that the testator did not intend to revoke the intermediate codicils when he executed the fourth codicil, confirming the will and first codicil; and it might be argued that these codicils form part of the will so confirmed. *Crosbie v. M^r Douall*, 4 Ves. 615. *Smith v. Cunningham*, 1 Add. 448.

SIR H. JENNER FUST was of opinion that, upon the face of the papers, the second and third codicils were revoked, and that, on motion, he could not decree probate of them. The motion was rejected, and probate of the will and first and fourth codicils only decreed.

Clearson v. Teague.

Prerogative Court

CLEARSON v. TEAGUE.¹

August 13, 1851.

Will — Codicil — Probate Revocation — Proof of Fraud.

B. made her will, in which she gave T. a legacy of 500*l.*, and appointed him executor thereof, jointly with A. C. and L. C. By a codicil, B. revoked the appointment of A. C. and L. C. as executors, and appointed T. sole executor, and gave him 50*l.* for his trouble as such. The capacity of B. was admitted, and A. C. and L. C. prayed probate of the will, without the legacy of 500*l.*, and of the codicil, without the appointment of T. as sole executor and the legacy of 50*l.*, on the ground that the legacies and the appointment of T. were fraudulently inserted, without the knowledge of B. T. prayed probate of the will and codicil, with the legacies and appointment:—

Held, on the evidence, that B. was aware that the will and codicil contained the legacies and appointment of T. as sole executor; and probate decreed accordingly.²

THE argument in this case occupied several days. The facts, grounds of opposition, and the evidence are fully stated in the judgment.

Haggard, Jenner, Bayford, and R. Phillimore, for the several parties.

SIR H. JENNER FUST. The present case comes before the court under circumstances of great peculiarity, and of no ordinary character, for both parties are praying probate of the same will and of the same codicil, though in a different state: one party praying for probate of the will in its entirety, and also of the codicil; the other party praying that probate may be granted of the will and codicil, with the exception of certain passages. The prayer of the proctor on behalf of the executor of the will is, that probate may be granted of the paper bearing date the 25th of January, 1848, with the following words in the thirteenth, fourteenth, and fifteenth lines of the second sheet—that is, giving a bequest of 500*l.* to Mr. C. B. Teague, the deceased's solicitor; and praying also that probate of the codicil may be granted to him, including the words, "And whereas I have by my said will appointed E. Clearson and L. Clearson executrixes of my said will, now I do hereby revoke such appointment, as I desire my friend C. B. Teague to be my sole executor, and I give and bequeath to him a further legacy of 50*l.* for his trouble as such executor." The prayer of the opposing party is, that the court would pronounce against the force and validity of the words which I have just recited, both in the will and codicil; and having pronounced against these words, to decree probate of the will and codicil, under certain limitations, to Mr. Teague, jointly with E. Clearson and L. Clearson, the executors named in the will. Then both parties pray that the oppo-

¹ 15 Jur. 1016.

² See *Allen v. M'Pherson*, 1 H. L. C. 191, as to the jurisdiction of the Court of Probate, where part only of a testamentary instrument is opposed.

Clearson v. Teague.

site party may be condemned in costs. The question is, not whether the deceased was a competent testatrix at the time the instruments bore date, but whether she was acquainted with the contents of the instruments executed, since both parties pray probate of the same papers, though in different states, and this is an admission that the deceased was of competent capacity. The history of this case lies within a very narrow compass, for the will propounded bears date the 25th of January, 1848, and the codicil that of the 1st of November in the same year. Upon the allegation propounding these instruments two witnesses have been examined; a third witness present on the last occasion, being dead, could not be examined. The validity of the will must depend upon these two witnesses, who attested its execution. The purport of the will is, after appointing these two ladies, Mrs. Clearson and her daughter, and Mr. Teague, executrices and executor, to give some small legacies; then a legacy of 500*l.* to Mr. C. B. Teague; and the residue of 1500*l.*, 3*l.* per cent. reduced bank annuities, to be divided between Mrs. Clearson and her three children. There was a codicil, and of this very little notice has been taken, which bears date on the 26th of October, 1848, and that purported to revoke a small legacy given by the will, and gives the same amount to other persons; making no difference, therefore, with respect to the residue of the sum bequeathed, with the exception of the legacies mentioned. The codicil propounded bears date the 1st of November, 1848, and appoints Mr. C. B. Teague sole executor, and revokes the appointment of Mrs. Clearson and her daughter as executrices; it also revokes a bequest of 30*l.* given by the will, and gives Mr. Teague 50*l.* for his trouble as executor. This codicil of the 26th of October is not propounded. Is it revoked? There is no clause of revocation in the codicil of the 1st of November, 1848, and I do not know that it is necessarily revoked by it, though the same legacies are inserted in both. This, however, is merely a formal matter — it has nothing to do with the merits of the question; but the codicil is duly executed, as acknowledged by all parties, and is attested by witnesses. If it is not revoked, by burning or tearing by the deceased, or by some person in her presence, or by the execution of another will or codicil, it is a good subsisting codicil at the present time; and supposing that to be so, it would render the revocation of the probate already granted necessary, in order to have that codicil inserted. But there is too much matter in the case, as originally introduced, to induce the court to spend any further time upon that, because, simple as the disposition seems to be, there is so much introduced into the case, both intrinsic and extrinsic, that the court must necessarily, for the sake of the parties, enter minutely, to a certain degree, into the circumstances. This testatrix, it appears, was, at the time of her death, about seventy-eight or seventy-nine years of age. She had married, in the beginning of the year 1845, a second husband, of the name of T. Bowditch, who appears to have been some few years younger than herself. Mrs. Bowditch was the aunt of Captain Clearson, who died, I think, in November, 1845, leaving a widow and three children, which children were at the death of the deceased, so far as

Clearson v. Teague.

the court is able to collect it from the evidence, the only next of kin of the deceased. It appears that, upon the death of Captain Clearson, she had promised to do all she could to provide for these children; and it seems that at the time of her marriage to Mr. Bowditch, in the beginning of 1845, a settlement was executed, by which, during her lifetime, she was to enjoy for her separate use an interest in the sum of 1500*l*.; the husband, in the event of surviving her, was also to take a life interest in it, but he was to have no interest whatever in the principal. If the deceased did not dispose of it, it was to go to those persons who would be entitled to it, in the same manner as if she had never married. The deceased appears, shortly after the death of Captain Clearson, to have made a will — that is, upon the 18th of December, 1845; and of that will she had appointed Mrs. Clearson and her daughter L. Clearson executrices. By it she gave some trifling legacies, and the residue she directed to be equally divided between Mrs. Clearson and the three children. It is, therefore, quite clear that, up to that period, she had adhered to the promise made to Captain Clearson on his death bed, and repeated at different times afterwards. The declarations of this lady are spoken to by many of the witnesses who have been examined on behalf of Mrs. Clearson, and also by a witness who is supposed not to be very favorably inclined towards them, named Mary Brown, at whose house the deceased lodged from December, 1847, to August or September, 1848. These declarations, so far as they can go, show that she adhered to this disposition of the residue to the Clearsons. At this time about 130*l*. or 140*l*. was taken out of the property, and the residue was to be divided between these parties. But it seems that on the 25th of January, 1848, the will now before the court was executed by her. Its execution is not disputed; there is no controversy that she executed it in the presence of witnesses — that the witnesses attested it, and subscribed their names in the presence of the testatrix. The effect of that will, in the more important part, is to give 500*l*. out of the 1500*l*. to Mr. Teague, who was her solicitor. Then comes the codicil of the 26th of October, 1848, which is also executed by the deceased; and then follows the last codicil, of November, 1848, by which Mr. Teague is appointed sole executor, and for which he is to have 50*l*. in addition to the 500*l*., that 50*l*. being for his trouble as executor. Now, these are circumstances which certainly, in themselves, necessarily invite full investigation, and call for the examination of the evidence given in support of this will and codicil with a great degree of particularity, watching it with jealousy, because I think it is quite impossible not to see that taking 500*l*. out of the 1500*l*. bequeathed to the Clearsons is a startling fact; it being in opposition to the promise which the deceased had made to her nephew, and to which she had adhered both in the will of 1845 and in the declarations spoken to by the witnesses. But then the court must be careful in setting its face against a solicitor obtaining a will from an aged person, to guard itself against carrying the principle so far as to operate against that which is proved to be the undoubted intentions of the deceased herself. But, independently of these facts, there has been introduced into this case that which

Clearson v. Teague.

certainly does not tend to relieve it in any degree from the intricacy and difficulty which belong to it, namely, certain facts with respect to a sum of 1400*l.*, 3*l.* per cents. reduced, in which she had a life interest, and which, after her death, was given over to certain other persons, and over which she had no disposing power whatever, though it is quite clear, from all that took place, that she believed she had such disposing power, and she was dissatisfied with an opinion given to her that she had no such power. I confess I was not prepared to hear the argument upon this part of the case pressed to such an extent as it was by the learned counsel in opposition to the will. But I was told, when the court expressed some impatience, perhaps improper impatience, at the extent of the argument, that the court was accessory to it, by admitting the allegation to proof, in which the circumstances connected with the transaction were set forth; and perhaps the court may be subject to some degree of blame on that account. Most undoubtedly the court will be very careful in admitting extrinsic evidence upon that with which it cannot deal, and will be very careful before it puts itself in the same situation again, to have the same burden imposed upon it which it has had in this case. But, as this part of the case has been argued, it is necessary that the court should look a little into the circumstances of it before it refers to the evidence produced in support of the papers propounded. [The court examined at some length the averments and evidence upon this part of the case, which it is not necessary to refer to, and continued.] The principal evidence produced upon the question of the deceased's testamentary intentions is that given by Miss Clearson and Mrs. Brown. [These witnesses, whose evidence was referred to at length in the judgment, deposed to declarations made from 1845 to 1848, that the Clearsons were executrixes, and that nothing of the 1500*l.* promised had been taken from them.] If I had been asked whether it was probable that the deceased would have left Mr. Teague 500*l.* in 1848, I should at once have admitted that I could conjecture no reason why she should do so, any more than in 1845, except that she had employed him a longer time as her solicitor. However, it is necessary to see what the real history of the case is. It would be extremely difficult to form a conjecture as to the principle upon which these declarations were made by the deceased, which are inconsistent with the disposition of 1848. I see no reason whatever why the sum of 1500*l.* should have been diminished by so large a portion as is taken out in 1848, the deceased saying in the middle of the year that there would be that for the Clearsons which she had promised, 1500*l.* The matter then stands in this way: there are declarations of the deceased inconsistent with the contents of the instrument, and what is to be the effect of it? Can the court on that ground, and that there is no probability for that disposition, come to the conclusion that, therefore, a fraud has been practised on the deceased, — a downright, palpable fraud, as deliberate and gross as can by possibility be conceived, — in concealing from her a part of the instrument which she was called upon to execute? Yet I must say, with respect to what has hitherto transpired, that 500*l.* was not

Clearson v. Teague.

a probable bequest to Mr. Teague; but then I am bound to look at the real fact — at least, when I say the real fact, I can only take that which is sworn to by the witnesses. Judging from the circumstances stated, the deceased knew and understood the contents of the will of January, 1848, and knowing those contents, part of which was to give 500*l.* to Mr. Teague, she executed the will in the full possession of her faculties. The two witnesses examined in support of the will and codicil propounded are Sympson and Chapple. The court will take the evidence of Sympson first. During the course of the argument, it was stated that the instructions, the draft, and the will all contained this bequest of 500*l.* to Mr. Teague, written clearly and distinctly, so far as the will itself was concerned, though with respect to the instructions and the draft the writing is not so legible, nor was it necessary that it should be so, as in the engrossed copy. It is certainly true, that the instructions were taken by Mr. Teague, that the draft was drawn by him, that the engrossed copy was made by one of his clerks, that the execution took place in Mr. Teague's office and presence, and that two of his clerks attested the will, the codicil being executed in the presence of a third clerk. These are circumstances which would set the court, as in all these cases it is inclined to be, against the party who claims under an instrument so prepared. I trust this court has not shown itself backward in not considering cases of that description entitled to its favorable consideration; but, as I stated before, I must take care, in acting on that principle, not to carry it to such an extent as to defeat that which is proved to be the intention of the deceased. Sympson, an attesting witness to the will, deposes "that the legacy was in the draft." He also states that "the will was not read to, or by, Mrs. Bowditch." That is not the story which is told by Chapple, undoubtedly; for, as will presently appear, he swears he did read the will to the deceased, and she herself said, also, that she had read it. It is not immaterial to notice that the memorandum is confirmatory of Mr. Chapple's story as to the time when the will was read to the deceased. Mr. Sympson has no doubt that the words in question, that is, the 500*l.* to Mr. Teague, formed a part of the will at the time it was executed. Therefore, it is perfectly plain, from the testimony of Sympson, that the 500*l.* was in the instructions, was in the draft, and was in the will at the time it was engrossed and when it was executed. The will was not read over in the presence of Sympson, but I do not think that his evidence, as to not recollecting or not thinking that it was read to or by the deceased, will have any effect in destroying the testimony which Mr. Chapple has given. But it is principally upon the evidence of Chapple that the knowledge of the contents must be brought home to the deceased. I say *principally*, because there is evidence to show that this legacy formed a part of the will when Mrs. Bowditch executed it. He has been what he calls out-door clerk to Mr. Teague, but he appears now to be a tide waiter at Gravesend. He was there in January, 1849, and he begins by making a mistake as to the time of the execution of the will, which he afterwards corrects. He states the circumstances attending the preparation of it, and says that he

Clearson v. Teague

has a perfect recollection of it, irrespective of a memorandum which he has seen, and by which he corrects the date. There was no secrecy in the office; Sympson knew and Chapple knew the contents of the instrument. Chapple also deposes, and is confirmed by a memorandum in the office book, that he took the will engrossed to the house of the deceased; that she had had it in her possession three weeks; came to the office with the will in her possession; declared she had read it over at home, which there was full opportunity to do, and that it was like the former will, except the legacy of 500*l.* to Mr. Teague, he being one of the executors. Where am I to get a contradiction to this? Am I to take it upon myself to say that Mr. Chapple has deposed falsely and untruly? It is a corrupt, deliberate, palpable, gross falsehood if these things did not occur. The reading over undoubtedly depends on this witness, confirmed by the entry in the memorandum book. Now, what is the contradiction between this witness and Sympson? Sympson had left the office, and he does not recollect that Chapple had gone into the office before he was called in to attest the execution of the will. There was sufficient time before to have read the will over, and I cannot conceive on what ground it is that I am not to believe the witness. What is to impeach his character? He was clerk to Mr. Teague, undoubtedly; but so were Sympson and Lawrence, who attested the codicil. I do not know that that is to affect his character, unless there is something else to damage it. Here, then, is testimony sufficient to support an act even of this description, where the instructions were taken by the person to benefit under them, and the will was engrossed by his clerk, executed in his own office, and attested by his own clerks. I cannot find ground on which I can disbelieve the witness. I may conjecture — I may be prejudiced; but I cannot take upon myself, sitting here judicially, to say I can lay aside or depreciate the evidence given by this person.

Again: is it likely that any man intending a fraud would lay before the deceased, for execution, a will written as this is, — so distinct and so legible, — “500*l.* to my friend Mr. Teague”? For I never saw a will more fairly engrossed; I never saw an instrument so perfectly legible as this. I cannot, therefore, for one moment suppose that this was a species of fraud which was to be perpetrated. Apparently there was no concealment from the deceased: the will was fairly and for a length of time laid before her. When it is said that Chapple has an extraordinary memory of minute facts, if that is to detract from his testimony, I must say there are no minute facts. It must be wilful and corrupt perjury if Chapple did not audibly and distinctly read the will over to her; it must be wilful and corrupt perjury if he did not leave the will at Newington on the 6th of January — if he did not show her into the clerk's room. Can I take a person to be wilfully and corruptly perjured upon the mere declaration of a person that he does not remember to have seen a room opened for five weeks? or on the statement of another person, who does not recollect that he left the office at the time of the execution of the will? It is impossible for the court to hold that he is most

Clearson v. Teague.

deliberately, wickedly, corruptly perjured, on such slight facts as these. Is there nothing else to confirm all this? What am I to say to Mrs. Teasdale? Who is she? What is there to impute to her? If there was not the suggestion mentioned, that witness is corruptly perjured; for this is a minute fact, with respect to which she could not be mistaken. She had a conversation with the deceased in Mr. Teague's office, who had recommended her as a lodger, but the terms were not acceded to. The deceased told her in the first instance that she meant to leave Mr. Teague executor, and to leave him a sum that might be of use to him; and afterwards she told her that she had made her will, and left Mr. Teague something useful to him and to his family. There is nothing to meet this but the declarations of the deceased, and the promise she had made, and it is in conformity with what appears on the face of the will. The evidence of Mr. Williams is to the same effect, and it all corroborates the story given by Chapple. Declarations are seldom to be trusted; they are very often insincere. Under all the circumstances of the case, I have no doubt, with respect to the will, that it is the act of a capable testatrix, executed by her with a knowledge of its contents, and an intention to give effect and force to the bequests contained in it. With respect to the codicil, I do not see the necessity for it, or for giving 50*l.* additional to this gentleman out of a sum of 1500*l.*, which was all she had to dispose of. But here we have the testimony of Chapple to the reading over, and the declaration of the deceased, that she had appointed Mr. Teague to be sole executor. I am of opinion, therefore, that the will and codicil are proved to be those of Mrs. Bowditch, executed with a full knowledge of their contents. Though I should have been very glad to give the benefit, if I could have found grounds for it, to these ladies, yet I do not feel justified in setting aside such evidence as is given by the witnesses in support of these papers, and I must decree probate of the will and codicil to Mr. Teague as sole executor. With respect to the codicil of October, 1848, that is not revoked by any clause in the codicil of the 1st of November. I do not know that it is necessarily revoked by that codicil. It is very true there is a repetition of legacies, but I do not know that that necessarily operates as a revocation. I confess I feel it difficult to know how to dispose of the codicil of October.

Jenner. The legacies are the same; but in the codicil of November, there is this clause: "I do hereby ratify and confirm my said will in every respect, except where the same is hereby revoked and altered by this my present codicil."

SIR H. JENNER FUST. That would seem as if she did not mean to confirm the codicil; but would it revoke it? Is that a sufficient indication of revocation? What is the law as it now stands? A codicil once executed cannot be revoked, except by burning, tearing, or otherwise destroying, or some other instrument to revoke that former instrument. At the time of the execution of the second codicil, she is asked what she had done with the first, and her answer is, "I

Parlby v. Parlby.

have destroyed, or I will destroy it." Therefore, she knew that codicil was in existence.

Jenner. It occurred to me by these words that she had destroyed, or meant to destroy it—that she executed this codicil *animo revocandi* of the other.

SIR H. JENNER FUST. Is this an intention to revoke that which she knows to be in existence, and which she says she has destroyed or will destroy? I think the party must take probate of both.

Prerogative Court.

PARLBY v. PARLBY.¹

July 1, 1851.

Pleading — Evidence — Absence of Witness.

In a suit respecting a grant of administration to a deceased intestate, between the alleged widow and the brother, the widow pleaded, in proof of the marriage, a certificate of baptism of a child, as the lawful child of her and the deceased, written and signed by the officiating minister, since deceased, and attested by three persons, one of whom was alleged to be deceased, another to be in New South Wales, and the third was not accounted for. The certificate did not purport to be an extract from any register kept by public authority, or otherwise:—

Held, first, that such certificate could not be received; and,—

Secondly, that the absence of the two surviving witnesses must be satisfactorily accounted for.

JAMES EDWARD PARLBY died in December, 1850, intestate, leaving Sophia Sylvester Parlby, alleging herself to be his lawful widow, and G. F. Parlby, a brother, who denied the interest of the alleged widow. An allegation was brought in in support of the marriage, in which the fact of the marriage, cohabitation in several places, and the birth of children, were pleaded. The seventh article pleaded, that the said Sophia Sylvester Parlby, being at Dunkirk, in France, on her way to Paris, and being then near her confinement, and in an ill state of health, was desirous of making some arrangements as to the disposition, in case of her death, of certain property to which she was entitled; and in order to secure the better identity of her aforesaid daughter by her baptismal name, and for other reasons, was desirous of having her baptized, and application was accordingly made to the Rev. R. Rideout, clerk, A. M., the then licensed officiating Protestant minister at Dunkirk, and on the 5th of February, 1831, the said Rev. R. Rideout duly baptized the said child, (by the name of Ida Sophia Parlby,) according to the rites and ceremonies of the church of England, in

¹ 15 Jur. 973.

Parlby v. Parlby.

the presence of divers credible persons, who then and there duly subscribed their names to an official certificate of such baptism, as hereinafter specially pleaded and set forth. And the party proponent doth further allege and propound, that the said Sophia Sylvester Parlby, in consequence of such her ill state of health, was unable herself to attend and be present at the ceremony. The eighth article pleaded, that there is not any authorized or formal register kept of baptisms solemnized at Dunkirk by the Protestant ministers from time to time officiating there; and the party proponent expressly alleges and propounds, that no entry, or any authorized or formal register, was ever made of such aforesaid baptism, but that the said Rev. R. Rideout, immediately after the solemnization thereof, with his own hand drew and wrote out a certificate of such the baptism of the said Ida Sophia Parlby, and duly subscribed the same, such certificate being in the words and form following, to wit, "This is to certify that Ida Sophia, daughter of James Edward Parlby and Sophia Sylvester his wife, was baptized, according to the rites and ceremonies of the church of England, at Dunkirk, in France, the 5th day of February, 1831, by me, R. Rideout, A. M., licensed officiating minister at Dunkirk aforesaid." And in verification of the truth of such certificate, Daniel Sutton, and Robert H. Sutton, his son, and a female servant, Marie Gregorius, who were severally present at the solemnization of such baptism, respectively subscribed their names as attesting witnesses to such certificate. The ninth article pleaded the certificate as an exhibit, and the handwriting of the Rev. R. Rideout, and the identity of the parties, in the usual form. The tenth, general reputation that the child so baptized, and now living, was the lawful child of the deceased and his now widow. The eleventh, that the said Rev. R. Rideout, clerk, departed this life several years since at Dunkirk aforesaid; and Robert H. Sutton, and Daniel Sutton his father, respectively parties attesting the certificate of the baptism of the said Ida Sophia Parlby, in the eighth article pleaded and referred to, returned to England after the said year 1831, and resided at Colchester, in Essex, and about fourteen years ago quitted England for New South Wales; that subsequently thereto intelligence was received of the death of the said Robert H. Sutton at Hobart Town. And the party proponent further alleges and propounds, that the said Daniel Sutton, if living, is believed to be still resident somewhere in New South Wales, but where more particularly he is unable to set forth. And the party proponent further alleges and propounds, that the said place of residence of the said Marie Gregorius, if alive, is altogether unknown to him. The twelfth article pleaded the handwriting of Daniel and Robert H. Sutton, in the usual form.

Jenner and Harding, for the brother. The certificate is not admissible. If any person was present at the transaction, such person should be produced, in which case the certificate will be unnecessary; and if no witness can be produced, still the certificate cannot be made evidence. It is not a document made under public authority, but a mere private memorandum, to which the fact of its being attested can

Parlby v. Parlby.

give no additional effect: it may be at the most compared to the Fleet books, which were not received. Nor is it like a declaration made by a member of the family, for neither father nor mother was present at the time; and even if the mother had been present, the declaration, being made for a particular object, and by a party to the suit, could not be admitted. And the eleventh article of the allegation shows that the best evidence has not been exhausted. The absence of Sutton and Gregorius is not sufficiently accounted for. [They referred to Tayl. Evid., s. 1167.]

Addams and Twiss, contra. The certificate is not evidence *per se*; it is pleaded as a circumstance in the case; and where that is so, and the object for which such a document is intended is merely collateral, so much strictness is not required. The admission of the certificate will save expense, bulk of evidence, and delay. Besides, this may be compared to a pedigree case, which is open to evidence which would not be received in other cases. *Coods v. Coods*, 1 Curt. 755, was a different case. In *Steadman v. Powell*, 1 Add. 55, the marriage was held to be proved by circumstantial evidence; and in *Mellin v. Mellin*, 2 Moo. P. C. 493, a marriage certificate from the Isle of Man was made an exhibit. Hubback on Succession, pt. 2, ch. 4, as to the effect of the ordinary certificate.

SIR H. JENNER FUST. The question raised has respect to a grant of administration to the widow or the brother of a deceased intestate. A legal marriage is pleaded, and if it be proved, and no cause shown to the contrary, the widow is entitled to the preference. However, the marriage is denied by the brother, and the allegation in support of the widow's case pleads, amongst other things, the baptism of a child, the lawful offspring of that marriage; and in supply of proof, a certificate of such baptism is pleaded as an exhibit, which purports to be that of a licensed officiating minister. The first difficulty in receiving this certificate is, that there apparently exists no formal register — no document with which it may be compared, and which might show preceding or subsequent entries, the usual course being to call for production of the register itself at the hearing. But how is this so-called certificate entitled to be considered evidence? It is a mere memorandum that Mr. Rideout baptized a child, purporting to be the child of such and such persons. It affords no proof whatever of the fact to be established. I doubt if the certificate of the bishop, which has been referred to, would be received as evidence of the marriage. And *Mellin v. Mellin* is clearly against the position in support of which it was cited; for their lordships paid no attention to the certificate in that case, but called for the evidence of some person present at the marriage. With respect to the eleventh article, it may be very true that the party proponent, that is, the proctor, may not know any thing of the persons named, but the party to the suit may know, and ought to show due diligence in producing them, or satisfactorily account for their absence. I shall reject all that arises out of the certificate, and the witnesses, if living, must be produced, or, if not produced, their absence accounted for.

Laneuville v. Anderson.

Prerogative Court.

LANEUVILLE v. ANDERSON.¹

May 26, 1851.

Practice — Act on Petition in principal Cause.

W. A., an Englishman by birth, made an English will, in 1843, being then in England, and he made a French will, in 1848, when he was in France. He possessed large real and personal estate in England, a house and other inconsiderable property in France. An allegation propounding the will of 1848, and pleading W. A. to have been domiciled in France, was admitted, when an act on petition was brought in on behalf of the person interested under the will of 1843, submitting that, in the circumstances, the will of 1848, if valid, did not revoke the will of 1843:—

Held, that the domicile was the only question before the court, and that the bringing in the petition was contrary to the practice, and must be rejected.

THE deceased was a native of Ireland, born in 1774; on the death of his father, in 1830, he succeeded to a considerable real estate there, of which he died seized. At an early age he was brought to England, where, with the exception of short, temporary absences, he resided till the year 1835. From the year 1835, till his death, in December, 1849, he was principally resident in France; but he came to England every year for a few weeks, during which time he occupied lodgings at Bristol, where, in 1843, he made a will, of which he appointed his nephew sole executor. This will, duly executed, was placed with other papers of importance, and left in England, where it remained till his death. In 1848, being in France, he made a holograph will, valid by the French law, and in which he named M. Laneuville universal legatee. He possessed about 35,000*l.* in the English funds, a house and other inconsiderable property in France. This last will was propounded, on behalf of M. Laneuville, in an allegation which originally pleaded a variety of circumstances, but, in the form in which it was finally admitted, pleaded merely sufficient to raise the question of domicile. From its admission in that shape, the nephew, who was the other party in the cause, asserted an appeal, which he afterwards waived, and brought in an act on petition, alleging briefly the circumstances above stated in relation to the deceased, and submitting, that if the will of 1848 was of any force or validity, still that if the very facts pleaded in the allegation were admitted, and on the face and appearance of the two documents of 1843 and 1848, the latter would be of no force or validity to revoke the former, which was, therefore, under any circumstances, a good and valid will, so far as regarded the testator's estate, both real and personal, in Great Britain and Ireland.

Jenner and *Bayford* opposed the admission of this act. Two courses were open to the nephew: he might have prosecuted his appeal, or

¹ 15 Jur. 850.

Laneville v. Anderson.

have brought in his answer to the articles of the allegation ; but, instead of that, he has taken a step contrary to the practice of the court, which does not allow a petition to be brought in, raising the very question which is the subject of the principal cause. By opposing the allegation, the other side has got rid of every thing but the fact of domicile ; but if the petition is admitted, we must answer it, by alleging all the circumstances which were pleaded in the original allegation, and struck out as irrelevant. And besides this, there would be two causes going on in the same matter — one by plea and proof, the other upon the petition.

Addams and Twiss, contra. The question is one of convenience, and the case may be more speedily and with less expense disposed of in this manner. That is an answer to the argument raised upon the practice of the court. The case is one of first impression. If the deceased had died intestate, a very different question might have been raised ; but he has not done so ; and it cannot be contended, even upon the admitted facts, that the French will has revoked the English will ; and the French courts may determine whether the latter is a good will for the purpose of passing the property there. It is not a question whether the French will be good or not, but whether the will duly made in England is revoked.

SIR H. JENNER FUST. Every one of the arguments now addressed to the court has been urged before. The only question I have to decide is, whether or no the deceased was a domiciled Frenchman : that will be determined upon the allegation ; and if the admission of that allegation was not satisfactory, the appeal should not have been waived. As to this act on petition, it is a novel, and I will venture to say an unprecedented, attempt, which ought not to be encouraged. I shall reject it, and direct the answers to the allegation to be brought in.

Lemann v. Lemann.

Prerogative Court.

LEMANN v. LEMANN.¹

July 1, 1851.

1 Vict. c. 26, s. 9 — *Foot or End.*

THE first thirteen lines of the will propounded were written by the deceased, who, being too feeble to continue writing, requested C. M. L. to go on writing it from his, the deceased's, dictation. C. M. L. accordingly proceeded with and completed the writing, which extended to the bottom of the third page of the paper, leaving space sufficient for the signature of the deceased; but C. M. L., finding there would not be room for the whole of the attestation clause on the third page, wrote that clause on the upper part of the fourth side, on which side, and near the top, the deceased made his signature. The only question was, whether this signature was at the foot or end of the will; and that point having been frequently determined, at least on motion, in precisely similar cases, (see note to *Goods of Anderson*, 15 Jur. 92; 1 Eng. Rep. 634,) the case would not have required notice, but for a decision by the Court of Delegates in Ireland, on the 17th of June, in *Derenzy v. Turner*, where the will was written on two sides of a sheet of paper, and came down to within about two inches of the bottom of the second page, which were left blank; then, at the top of the third page, the attestation clause was written, at the side of which the signature of the testatrix was affixed, and, immediately under, those of the witnesses. There were no facts in controversy in the case, there being a consent admitting all the facts; and one of these was, that the gentleman who drew the will, and witnessed it, conceived that it was essential that there should be an attestation clause, and there would not have been room for the attestation, as he drew it, at the bottom of the second page, so he carried it on to the third side, and there placed the seal for the testatrix; and that court, advertg to the several cases decided in England upon the point, held the will to have been well executed.

Addams, Jenner, Harding, R. Phillimore, and Spinks were heard for the several parties.

SIR H. JENNER FUST rejected the allegation propounding the will, observing that the judgment of the court in Ireland was not an authority to bind the courts of probate here.

¹ 15 Jur. 850.

 Brown v. Nicholls.

Prerogative Court.

BROWN v. NICHOLLS.¹

June 12, 1851.

Practice — Administration de Bonis with Will annexed — Substituted Legatee for Life — Substituted Legatee.

A substituted legatee for life is entitled to letters of administration *de bonis* with the will annexed, in preference to a substituted legatee; but where there is a doubt whether, under the terms of the will, the person claiming as legatee for life is entitled as such, the grant will be made to the legatee whose interest is admitted.

IN the will of Mary Davies, the following clause occurred: "I give and bequeath the sum of 1150*l*., other part of the said stock now standing in my name as aforesaid, unto the said Edward Tomkins and Edward Harding, and the survivor of them, and the executors or administrators of such survivor, upon the trusts, and to and for the ends, intents, and purposes hereinafter declared of and concerning the same — that is to say, upon trust that they do and shall apply the interest, dividends, proceeds, and profits of the said sum of 1150*l*., stock, from time to time, as the same shall become due and payable, unto Davies Morris Middleton Brown, otherwise John Davies, now or late of his majesty's ship Pluto, mariner, for and during the term of his natural life; and from and immediately after his decease, upon trust to pay the interest, dividends, proceeds, and profits of the said securities, from time to time, as the same shall become due and payable, unto his wife, if she shall happen to survive her said husband; and upon trust, immediately after the decease of the said Davies Morris Middleton Brown, otherwise John Davies, and his said wife, or the survivor of them, to pay and divide the said stocks, funds, or securities unto or between all and every the children of the said Davies Morris Middleton Brown, otherwise John Davies, lawfully begotten, share and share alike, if more than one; and if only one child, then to such only child: but in case it shall happen that the said Davies Morris Middleton Brown, otherwise John Davies, shall depart this life without leaving lawful issue of him surviving, then upon trust that they, my said trustees, and the survivor of them, and the executors and administrators of such survivor, do and shall, from and immediately after the decease of the said Davies Morris Middleton Brown, otherwise John Davies, and his said wife, or the survivor of them, pay the interest, dividends, proceeds, and profits of the said stocks, funds, or securities unto the said John Nicholls during the term of his natural life; and from and immediately after his decease I give and bequeath the said last-mentioned stocks, funds, or securities unto and equally between all and every his children." Davies Morris Middleton Brown had never been married at the death of the testatrix, which took place in 1815; but in 1817,

¹ 15 Jur. 934.

Brown v. Nicholls.

he married J. B., who was a stranger to the testatrix, and by whom he had two children, who died in their infancy. J. B. died in 1830, and in the same year he married his second wife, who survived him, and now applied for letters of administration with the will annexed of Mary Davies, left unadministered, as a legatee for life substituted in the said will. This application was opposed on behalf of F. Nicholls, one of the natural and lawful children of John Nicholls, and as such a legatee substituted in the same will. The facts were admitted, and the only question raised in the act on petition and in argument was, whether the widow of Davies Morris Middleton Brown, in the circumstances of the case, took any interest in the fund under the will.

Addams, for the widow, cited *Peppin v. Bickford*, 3 Ves. 570.

Harding, for F. Nicholls, referred to 1 Jarm. Wills, 284.

SIR H. JENNER FUST. The point in this case belongs to the learning of another court, and I should be unwilling to decide it. Supposing I were to decree the grant to the widow, I should, in fact, decide that she was entitled to a life interest, whilst, in allowing the other party to take the grant, I decide nothing, and leave the case to a court of construction. It certainly is the usual practice, that the substituted legatee for life should be preferred; but in this case there is a doubt whether the widow is entitled to that character, and there is no doubt that Nicholls is entitled to part of the fund ultimately. For these reasons, I think it better to decree the administration to Nicholls, with justifying security.

INDEX TO VOL. VI.

Chancery.

ACCUMULATION.

Thellusson Act — Tenant for Life.] A testator gave a legacy of 5000*l.* to A. on her marriage, and gave the residue of his personal estate to B. for life, with remainder to C., and died in 1825. Upwards of twenty-one years elapsed from the death of the testator, and A. was not married. B. died in 1838, and the twenty-one years from the death of the testator expired in 1846. At this time the legacy fund consisted, first, of the original legacy; and, secondly, of the interest on the legacy accumulated for the twenty-one years, called "the accumulation fund:" —

Held, that the interest of the 5000*l.* accrued, and to accrue, between 1846 and the death or marriage of A., belonged to C.; that the interest on such part of "the accumulation fund" as was produced between 1825 and 1838, accrued, and to accrue, between 1846 and the death or marriage of A., belonged to the personal representatives of B.; and that the interest on the remaining part of "the accumulation fund" accrued, and to accrue in like manner, belonged to C. *Morgan v. Morgan*, 130.

ACQUIESCENCE.

See INJUNCTION, 1.

AFFIDAVIT.

1. *Injunction — Revival — Common Order — Amended Bill.*] The common injunction having been dissolved on the merits shown by the answer, the plaintiffs amended their bill, and upon an affidavit verifying in general terms the truth of the amendments, again obtained an order for the common order: —

Held, that the defendant could not contradict that affidavit, but that it was open to the defendant to show that the answer would not afford the plaintiffs a defence at law, and that the amendments did not materially vary the original case. *Zulueta v. Vincent*, 122.

2. *Time for filing.*]

See PRACTICE, 2.

AMENDED BILL.

Injunction — Revival — Common Order.] The common injunction having been dissolved on the merits shown by the answer, the plaintiffs amended their bill, and upon an affidavit verifying in general terms the truth of the amendments, again obtained an order for the common order: —

Held, that the defendant could not contradict that affidavit, but that it was open to the defendant to show that the answer would not afford the plaintiffs a defence at law, and that the amendments did not materially vary the original case. *Zulueta v. Vincent*, 122.

VOL. VI.



 Chancery.

ANSWER.

Insufficiency.] A defendant, in his answer to the usual interrogatory as to deeds, &c., stated that he had, in the schedule thereto, set forth a list of all the deeds, &c., relating to the matters in question in the suit, and traversed the interrogatory. One of the items in the schedule was "Banker's Pass Book:—" *Held*, that this description was sufficient. *Houghton v. Barnett*, 131.

See IMPERTINENCE.

APPOINTMENT.

See TRUSTEES, 1.

APPORTIONMENT.

See RENTS.

ATTORNEY GENERAL.

See JURISDICTION, 1.

BEQUEST.

See ACCUMULATION. LEGACY. WILL.

BILL TO REDEEM.

See MORTGAGE.

BILL OF SALE.

See MORTGAGE.

CASES APPROVED, CONDEMNED, &c.

Foden v. Finney, 4 Russ. 428, disapproved. 97.

CHARGING ORDER.

See STOP ORDER.

CHARITY.

Petition under Sir Samuel Romilly's Act — Motion — Attorney General.] By the deed founding a charity it was provided, that when the feoffees of the estates, fourteen in number, should be reduced to four, ten more should be appointed. The number of feoffees having become reduced to three, they presented a petition under the stat. 52 Geo. 3, c. 101, for a reference to the master to appoint new feoffees in trust. The reference being made, pending the proceedings under the order, the schoolmaster died, and it being necessary, pursuant to the foundation deed, that the office should be filled up within a month by the trustees and certain clergymen, notice was forthwith given of an election. A motion was made by one of the three surviving trustees, that the election should be postponed until the whole number of feoffees had been completed; but the court refused to interfere. *Butterwick Free School*, in re, 104.

CHARITY DEED.

Construction of.

See HALL'S CHARITY, in re, 150.

CODICIL.

See WILL.

COMMISSIONERS.

Fees — Depositions — Lien.] In the absence of a special agreement, a commissioner for the examination of witnesses will not be required to file the depositions taken in the cause without payment of his fees. *Peters v. Beer*, 63.

Chancery.

COMMON CLAIMS.

See PRACTICE, 8.

COMPANIES CLAUSES CONSOLIDATION ACT.

1. *Right to Execution.*] By the 36th section of the Companies Clauses Consolidation Act, 1845, all creditors of a company have a right of levying execution against the property or effects of the company. *Russell v. East Anglian Railway Co.*, 137.
2. *Bond Creditors.*] The 44th section of the same act declares that the obligees of railway bonds shall be entitled to be paid out of the tolls or other property or effects of the company, without preference on account of the date of the bond : —
3. *Equitable Lien.*] *Held*, upon the construction of the 36th and 44th sections, that the 44th section did not create a specific lien in favor of bond creditors upon the tolls or other property or effects of the company, and that this construction is not altered by the 32d section of the special act, (*ut infra.*) *Ib.*
4. *Receiver.*] By the 53d and 64th sections of the Companies Clauses Consolidation Act, mortgagees, who should by the special act be empowered to enforce their claims by the appointment of a receiver, were authorized to apply to two justices for the appointment of a receiver of the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, &c. *Ib.*
5. By the 32d section of the special act, mortgagees and bond creditors were declared to be entitled to be paid *pari passu*, and without preference one above the other, out of the tolls and other estate and effects of the company. And by the 33d section of the special act, it was declared that it should be lawful for the mortgagees or bond creditors of the company to enforce the payment of the arrears of principal and interest by the appointment of a receiver : —
Held, that the receiver spoken of in the 33d section is the receiver to be appointed by two justices under the 53d and 54th sections of the Companies Clauses Consolidation Act, and that the 33d section did not extend the rights of the bond creditors as regarded an equitable lien. *Ib.*
6. *Practice.*] Bond creditors of the company having obtained an order of the court below appointing a receiver, which this court was of opinion they ought not to have obtained, an execution creditor was allowed to levy, notwithstanding the goods and effects were in the possession of the receiver; and the court declined to order that the execution creditor should be examined *pro interesse suo*, all the facts necessary for the decision being before the court upon petition. *Ib.*

COPYHOLDS.

See HUSBAND AND WIFE, 3.

COSTS.

1. *Joint-stock Companies Winding-up Acts.*] A suit was instituted before the passing of the Joint-stock Companies Winding-up Acts, for the winding up the affairs of a company. The bill was dismissed, with costs, as against some of the defendants. An order was afterwards made under the Joint-stock Companies Winding-up Acts for the winding up of the company's affairs, and the official manager petitioned to have the money in court in the suit paid to him. The defendants, against whom the bill had been dismissed, with costs, appeared, although not served with the petition, and asked for payment of those costs out of the fund, on the ground that they had no means of getting them from the plaintiff; and the court ordered those costs, and also their costs of appearing on the petition, to be paid out of the fund accordingly. *Walworth v. Holt*, 50.
2. *Solicitor — Taxation.*] A solicitor, who sold his business, but who continued to conduct a suit in chancery in the office as the agent of one of the plaintiffs, independently of the solicitor who had purchased the business, will not be allowed to deny his agency, or to strike from the bills of costs of such solicitor the costs of proceedings which had been incurred by a mistake made in conducting the cause; and a petition for the taxation of the bills of costs under special circumstances was dismissed, with costs. *Gedye*, in re, 53.
3. *Taxation of.*] See BLACKMORE, in re, 10. MORTGAGE.

 Chancery.

COUNSEL'S NOTES.

See PRACTICE, 1.

DEED.

Legal Representatives — Construction.] The words "legal representatives" used in a deed, cannot be acted upon by the court, unless some context be found in the deed to explain them. *Tipping v. Howard*, 99.

DEPOSITIONS.

See COMMISSIONERS.

DEVISAVIT VEL NON.

See WILL, 2.

DIVIDENDS.

1. *Estate for Life.*] The dividends of a sum of stock were ordered, upon petition, to be paid to A. for her life, and, after her decease, to B. for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused. *Lowndes's Trust*, in re, 60.
2. *Prospective Order.*] The dividends of a small sum of stock, arising from the purchase money of real estate taken by a railway company, were ordered to be paid to a party claiming under a will, upon production of the probate copy, with an affidavit that it had been examined and was correct. *Ib.*

DISCOVERY.

See PRODUCTION OF DOCUMENTS.

EVIDENCE.

Plaintiff's Affidavit.] A plaintiff's affidavit in support of a claim will be treated as evidence where there is no opposition or conflict of affidavits. *Shardlow v. Gaze*, 69.

EXCEPTIONS.

Setting down.]

See PRACTICE, 3.

FEES.

See COMMISSIONERS.

GRAMMAR SCHOOL.

Dismissal of Master.]

See JURISDICTION.

GUARDIAN.

1. *Mother.*] The court will not appoint a mother to be the guardian of her children without having some information as to the family of the father. *Cook*, in re, 47.
2. *Petition — Next Friend.*] A petition by infants for the appointment of a guardian ought to be presented by them by their next friend. *Russell's Estate*, in re, 65.

HEIR AT LAW.

See WILL, 2.

HUSBAND AND WIFE.

1. *Settlement on Wife.*] Although the fund in court belonging to a married woman is less than 200*l.*, she is entitled to have the whole of it settled upon her, the husband being insolvent. *Cutler's Trust*, 97.
 2. The case of *Foden v. Finney*, 4 Russ. 428, asserting a contrary doctrine, disapproved of. *Ib.*
-

Chancery.

3. *Decree for Sale.*] Copyhold estates were sold for payment of legacies, under an order of court, which directed all proper parties to join in surrendering the property. The purchasers of three lots paid their purchase money into court, and required a surrender to be made to them. The legal estate was vested in a married woman, who wrote to the purchasers of two of the lots, disputing the legality of the sale and refusing to convey, but she gave no refusal as to the other lot. Her husband, who was interested in the estate through her, gave no refusal as to any of the lots. Upon a petition by the plaintiffs, under the 13 & 14 Vict. c. 60:—
Held, that the refusal enabled the court to make an order that the married woman, or some person in her place, should surrender, but that, where there had been no refusal, the court would not make any order either on the husband or the wife. *Rowley v. Adams*, 124.
Held, also, that if the husband and wife had refused to execute a proper deed, this court would have made an order vesting the estate in the purchasers, but that the notice served did not enable the court to make the order. *Ib.*
Held, also, that the husband and wife could not raise any objection to the petition for multifariousness, though it was presented by several parties having several interests. *Ib.*

IMPERTINENCE.

- Repetition.*] The defendants, in their third further examination before the master, annexed five schedules to their examination, in which a large mass of matter set forth in their previous examinations was repeated:—
Held, that the repetitions were impertinent; and it was referred to the master to expunge them. *Alfrey v. Alfrey*, 39.

INFANT.

See GUARDIAN. MAINTENANCE.

INJUNCTION.

1. *Misapplication of Capital—Acquiescence.*] Though a shareholder in a railway company has an equity to have an injunction to restrain the directors from applying the funds of the company in the completion of a part only of the line with a view to the abandonment of the remainder, yet where the shareholder, with the knowledge of the intention to abandon the greater part of the line, remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the court refused to interfere by injunction. *Graham v. Birkenhead, &c., Railway Co.*, 132.
2. *Secret of compounding Medicines.*] A party was restrained from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract. *Morison v. Moat*, 14.
3. In June, 1823, Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat, as manufacturers and venders of the medicine, for the purposes of the partnership, communicated to the latter the secret of compounding the medicine. By the partnership deed either party was empowered to introduce another partner, by deed, to be attested by the other; and, by mutual bonds of even date, Morison bound himself not to communicate the secret of compounding the medicine to any person except a partner so introduced; whilst Moat bound himself not to communicate such secret to any person whomsoever. Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son; and then, by deed, duly attested by Morison, appointed the defendant his successor in the partnership. Shortly after the death of Moat, the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership deed, containing a clause declaring the defendant a sleeping partner, and another clause, by which the partners covenanted not to divulge the secret of compounding the medicines to any person whomsoever. The defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison.

 Chancery.

Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs. After the determination of the partnership, the defendant made use of his knowledge of the secret communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison. Upon the application of the plaintiffs, the court granted an injunction restraining the defendant from selling, under the title or designation of "Morison's Medicine," any medicine manufactured by the defendant; and also from compounding any medicines according to the secret mentioned in the plaintiff's bill, and from in any way making use of such secret. *Ib.*

4. *Illegal Contract.*] Where the directors of a company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from laying down the rails till the validity of the contract had been decided upon at law. *Benan v. Rufford*, 106.

INSPECTION.

Joint-stock Companies Winding-up Acts — Documents — Creditors.] Creditors of a company ordered to be wound up filed their claims before the master, who, on their application, gave leave to inspect documents in the hands of the official manager: —

Held, on a motion by contributories to discharge the order, that the creditors were entitled to the inspection. *Walker*, ex parte, 51.

INTEREST.

On Legacy.] A testator bequeathed a legacy, payable to the legatee at the age of twenty-one, with interest from his death, and died in 1840. The legatee attained the age of twenty-one in 1850, and filed a common claim for the legacy, with interest, from her majority, and obtained a decree for the payment of the amount claimed, and received the money. The legatee afterwards, having discovered that she was entitled to interest from the testator's death, filed another common claim for this interest: —

Held, that she was entitled to this interest, but that she ought to have made it the subject of a special claim. *Matthews v. Pincomb*, 70.

See TRUSTEES. ACCUMULATION.

JOINT-STOCK COMPANIES WINDING-UP ACTS.

See COSTS, 1.

JUDGMENT.

See STOP ORDER.

JURISDICTION.

1. *Stat. 3 & 4 Vict. c. 77 — Sir Samuel Romilly's Act — Attorney General's Certificate.*] Where a petition is presented under Sir Samuel Romilly's Act, and in the matter of the act 3 & 4 Vict. c. 77, the court has jurisdiction to make a declaration as to the dismissal of a master of a grammar school, although the attorney general's certificate is not obtained, the court having previously made order for the management of the school under Sir Samuel Romilly's Act. *Godmanchester Grammar School*, in re, 46.

2. Orders of court do not take away its general jurisdiction. *Coyle v. Alleyne*, 64.

LEASE.

See RENTS.

LEGACY.

Bequest of Interest.] A testator bequeathed to his wife the interest of the capital sum of 1000*l.*, for her sole use and benefit, independent of any husband she might marry, and her receipt alone to be a sufficient discharge to his executors. He also gave his china, plate, &c., to his wife absolutely, and the residue equally between his two brothers: —

 Chancery.

Held, that the gift of the interest of 1000*l.* was tantamount to an absolute bequest of the capital. *Humphrey v. Humphrey*, 113.

See INTEREST.

LEGAL REPRESENTATIVES.

See DEED.

LIEN.

See COMMISSIONERS.

LIMITATIONS, STATUTE OF.

1. *Produce of Real Estate directed to be sold — State Demands.*] A testator, by his will, devised his real estate to A. and B., on the usual trusts, for sale, and directed them to pay a share of the purchase moneys to A. The testator died in February, 1816, and A. and B. proved the will. A. died in October, 1817. B. died in 1849, having appointed C. his executor. Letters of administration of A.'s estate were granted to D. in June, 1850. A claim filed by D., the administrator of A., against C., the executor of B., in respect of the share of the purchase moneys of the testator's estate given to A., was dismissed, with costs, but without prejudice to a suit. *Pawsey v. Barnes*, 66.
2. Whether the produce of real estate directed to be sold is a "sum charged upon or payable out of land" within the meaning of the 40th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27 — *quære. Ib.*

MAINTENANCE.

A petition was presented by an infant who had for some years been entitled to property amounting to 290*l.* per annum. The petitioner had been maintained by his father, who had incurred a large debt for the purpose, and was unable any longer to maintain his son. The petition stated that the father had been resident for many years in India, and it asked for a sum of 300*l.* for past maintenance:—

Held, that the father having resided out of the country, and being unable to apply to the court before, was a special circumstance which would enable the court to grant the sum required for past maintenance. *Carmichael v. Hughes*, 71.

MEDICINES.

Secret of compounding.]

See INJUNCTION, 2.

MISAPPLICATION OF CAPITAL.

See INJUNCTION, 1.

MORTMAIN.

1. A testator gave a sum of consols to the corporation of G., upon trust, in the first place, to raise 1300*l.*, which sum he directed should, in the event of any land being given or granted to the corporation for the purpose of his charity within the period of ten years next after his decease, under the provisions of stat. 9 Geo. 2, c. 36, be laid out and expended in or towards the foundation and building and furnishing of a substantial hospital for the city of G.; and he directed that no part of the said trust moneys should be applied in purchasing land; and that in case no land or site should be granted or conveyed for the purposes aforesaid within ten years after his decease, then the trust moneys should sink into the residue of his estate. A grant of land was made shortly before the expiration of ten years from the testator's decease, as a site for the intended hospital, but the deed was not enrolled till five days after the expiration of the ten years:—
Held, that the grant was a sufficient compliance with the conditions prescribed by the testator; but that the bequest was void, as offering an inducement for putting land in mortmain. *Trye v. Corporation of Gloucester*, 73.
2. A bequest is void which tends directly to bring fresh land into mortmain; and a bequest of money to be expended in the erection or repair of buildings is also

 Chancery.

void, unless the testator in his will expressly states his intention that the money so bequeathed is to be expended upon some land already in mortmain. *Id.*

MORTGAGE.

Bill of Sale — Indorsement — Redemption — Costs.] A party, entitled to eight sixty-fourths of a ship, transferred them to another by a bill of sale, on which was indorsed, that if the transferor should pay to the transferee 100*l.* and interest, the bill of sale should be void. Interest was subsequently paid on the money. The bill of sale was registered, but no notice was taken in the registry of the indorsement. The transferee sold to a third party, and the original transferor filed a bill against the others to redeem; and a decree was made in his favor, and with costs, so far as they were occasioned by the denial or dispute of his right to redeem. *Whitfield v. Parfitt*, 48.

MORISON'S MEDICINE.

See INJUNCTION.

MOTHER.

See GUARDIAN.

MULTIFARIOUSNESS.

See HUSBAND AND WIFE, 3.

NEXT FRIEND.

See GUARDIAN.

NEXT OF KIN.

See PLEADING, WILL.

ORDERS.

Orders of court do not take away its general jurisdiction. *Coyle v. Alleyne*, 64.

PARENT AND CHILD.

See MAINTENANCE.

PARTIES.

See PRODUCTION OF DOCUMENTS. PLEADING.

PARTNERSHIP.

See PRODUCTION OF DOCUMENTS.

PERSONAL REPRESENTATION.

See WILL, 1.

PLEADING.

Parties — Next of Kin.] A testator gave his real estate to trustees, upon trust, to lay out the rents, during twenty-one years from his death, in the purchase of freehold or copyhold lands, and to convey them at the end of that time to the person then answering the description of the testator's heir. The personal estate was bequeathed to the same trustees, to lay out in land for the same purpose. In a suit, instituted shortly after the testator's death, by a person claiming to be the heir at law, for the administration of the testator's estate, it was held, that the next of kin were necessary parties. *Ring v. Jarman*, 154.

See ANSWER.

PRACTICE.

1. *Notes of Counsel.*] The court will act upon notes on counsel's briefs if they

Chancery.

- agree, although no entry or corresponding minute appears in the registrar's book. *Anderton v. Yates*, 45.
2. *Time for filing Affidavits.*] Affidavits will be received, although filed after a time appointed, if a failure of justice or great inconvenience would be occasioned by their rejection. *Ib.*
 3. *Setting down Exceptions.*] Where exceptions for scandal and impertinence had been taken by the defendant to a bill filed for an injunction, but he neglected to set them down for hearing, the plaintiff was allowed to set them down. *Coyle v. Alleyn*, 64.
 4. Orders of court do not take away its general jurisdiction. *Ib.*
 5. *Writ of Summons — Service.*] On a claim for foreclosure, service of the writ of summons on the wife of a party interested in the equity of redemption, who was travelling in America, was ordered to be deemed good service on the husband under the stat. 4 & 5 Will. 4, c. 82, the wife being in the possession and receipt of the rents and profits of the mortgaged property. *Carwardine v. Wislade*, 103.
 6. *Receiver's Accounts.*] Where the expenses of attending the passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only. *Day v. Croft*, 62.
 7. *Decree — Subsequent Proceedings — Attendances.*] In the absence of directions made at the hearing of a cause, the court will not, upon an interlocutory application, make any order to restrain the defendants, though very numerous, from attending the subsequent proceedings in the cause, though the result would be a very large saving to the estate of the testator. *Ib.*
 8. *Common Claim — Special Claim.*] Where a question, which ought to have been made the subject of a special claim, is brought before the court on a common claim, the court will give leave to have it filed as a special claim *nunc pro tunc*. *Matthews v. Pincomb*, 70.
 9. *Order of Reference — Ex parte Proceedings — Investment of Funds — Parties interested.*] An order of reference, under the 4 & 5 Will. 4, c. 29, as to whether it would be for the benefit of the parties beneficially interested in a settled fund to lend it on the security of freehold estates in Ireland, may be made *ex parte*; but the court will not confirm the master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, have either been served with the petition, or appeared before the master. *Kirkpatrick's Trust*, in re, 152.

PRIVILEGED COMMUNICATIONS.

See PRODUCTION OF DOCUMENTS.

PROCHEIN AML

See GUARDIAN.

PRODUCTION OF DOCUMENTS.

- Partnership — Parties.*] A trading company having become embarrassed, appointed three of its members, A., B., and C., to act as a committee for the shareholders in winding up its affairs, and they were empowered to send out agents to India for that purpose; and they were empowered by the directors to manage and arrange the affairs of the company. They appointed D. and E. agents to go to India. The plaintiffs brought several actions on certain debentures against A., B., and C., as shareholders. A., B., and C. filed a bill for an injunction, and to have the debentures delivered up. The present plaintiffs then filed a bill against A., B., and C. for discovery. A., B., and C., in their answers, admitted the possession of certain documents, consisting of communications which passed between them and the directors, the secretary of the company, and the agents in India, and which were alleged to be confidential communications after the matters in question in this suit had arisen, and in contemplation of, or pending, proceedings in respect of various matters, and in particular of the claims of the plaintiffs, and for the purpose of communicating to the persons to whom they were addressed the proceedings adopted in respect of such claims, and the opinions of the legal advisers consulted

 Chancery.

by the defendants, or for the purpose of being submitted to such legal advisers and the shareholders; and they claimed protection from production:—
Held, first, overruling the objection that the defendants had the possession of the documents only as the agents of the directors and shareholders, and that they were not parties to the suit, and were not willing that the documents should be produced, that the defendants sufficiently represent the whole of the partners or shareholders for all the purposes of the suit. *Glyn v. Caulfield*, 1.
 Secondly, affirming the order of Knight Bruce, V. C., for production, that the documents were not privileged, with the exception of such parts thereof as contained the opinions of the legal advisers, it being no ground of privilege that they relate to the matters in dispute, and arose out of communications between the parties themselves, with a view to their defence in the suit. *Ib.*

RAILWAY COMPANY.

1. *Authority.*] Where a railway company is authorized by act of Parliament to construct a railway on the broad gauge, they are not prevented from laying down rails on the narrow gauge also. *Beman v. Rufford*, 106.
2. A railway company is not authorized to give up the management of its line to another company. *Ib.*
3. *Injunction.*] Where the directors of a company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from laying down the rails till the validity of the contract had been decided upon at law. *Ib.*
4. *Misapplication of Capital.*]

See INJUNCTION.

REMAINDER.

See WILL, 1.

REDEMPTION.

See MORTGAGE.

RENTS.

Apportionment.] By indentures, dated in 1828, certain lands were settled on A. for life, and a power of leasing was given to A. The Apportionment of Rents Act was passed in 1834. After 1834, A., under his power, granted leases of divers portions of the settled property. A. died in 1849:—
Held, that A.'s personal estate was entitled to a proportion of the rents of the lands of which he had granted leases under his power, between the last days of payment of rent and his death. *Lock v. De Burgh*, 65.

REVOCATION.

See WILL, 6.

SERVICE.

See PRACTICE, 5.

SETTLEMENT.

Portions — Interest.] A. by a deed, dated in 1826, settled property on himself, for life, with remainder for such of his children as he should by deed or will appoint, with remainder, in default of appointment, to all of his children equally. The deed contained a power enabling A. to give a jointure to any wife whom he might afterwards marry, and a direction that, unless the contrary should be directed by any appointment, it should be lawful for the trustees to apply the income of the share of any child for his maintenance. A. married soon after the date of this deed, and his wife died in 1836, and there were two children of this marriage. In 1836, A. married B., and, by a deed dated in that year, he gave a jointure to B., and

Chancery.

directed that, if there should be two children of the marriage, the trustees should raise 4000*l.* for the portions of such children, to be paid to them at their ages of twenty-one years, after the death of the survivor of A. and B., with power for the trustees to give interest on the portions between the death of the survivor of A. and B. and the time of payment. A. afterwards appointed portions for the children of the first marriage, with interest from his death. There were two children of the second marriage. A. died in 1849:—

Held, that the children of the second marriage were not entitled to interest on their portions between the death of A. and the death of his widow. *Gardner v. Perry*, 119.

See HUSBAND AND WIFE.

SOLICITOR.

See COSTS.

STATUTES CITED, EXPLAINED, &c.

52 Geo. 3, c. 101,	150
4 & 5 Will. 4, c. 82,	103
1 & 2 Vict. c. 82,	6
3 & 4 Vict. c. 77,	46
3 & 4 Vict. c. 82,	6
13 & 14 Vict. c. 60,	124

STOP ORDER.

A judgment creditor obtained a judge's order, under the 14th section of the 1 & 2 Vict. c. 110, charging a sum of stock standing in the name of the accountant general of the Court of Chancery, to the dividends of which the debtor was entitled for life, with payment of the judgment debt:—

Held, granting a stop order on the dividends, that the proviso in the 14th section, "that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order," did not prevent the creditor from taking steps to protect his security, but only prevented him from enforcing immediate payment of the debt by realizing the security. *Watts v. Jefferyes*, 6.

The 3 & 4 Vict. c. 82, extends the 1 & 2 Vict. c. 110, to dividends on stock. *Id.*

TRUSTEES.

1. *Default of Appointment — Joint and separate Powers of Appointment.*] By the settlement made on the marriage of A. and B., certain real estates were conveyed to trustees upon trust to pay the rents to A. for life, and, after his death, to B. for life, and, after the death of A. and B., upon trust for such one or more of the children of the marriage as A. and B. should by deed jointly appoint; and, in case of the death of A. in the lifetime of B., before any such appointment should be made, as B. by deed should appoint. A. and B. jointly appointed two fourths of the estate to two of their children. A. died. B. appointed the other two fourths to two other of the children:—

Held, that the appointments made by B. alone were valid. *Simpson's Settlement*, in re, 58.

2. *Breach of Trust — Rate of Interest — Accounts — Rests.*] Trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest at 5*l.* per cent., the accounts to be taken with rests. *Hutchins v. Hutchins*, 91.

WILL.

1. *Construction — "Personal Representative" — "Next of Kin."*] A testatrix gave personal estate to her sister for life, for her separate use, with remainder over among her nieces, with remainder, in case of the nieces dying without having had any child, "to the personal representatives or next of kin" of the testatrix's father:—

Chancery.

Held, that the next of kin at the death of the testatrix were the persons entitled. *Philps v. Evans*, 37.

2. *Validity of, how tried.*] It is at the option of the heir at law to have the validity of a will tried in an action of ejectment, or by an issue *devisavit vel non*. *Grove v. Young*, 38.

3. *Mortmain.*] A testator gave a sum of consols to the corporation of G., upon trust, in the first place, to raise 1300*l.*, which sum he directed should, in the event of any land being given or granted to the corporation for the purpose of his charity within the period of ten years next after his decease, under the provisions of stat. 9 Geo. 2, c. 36, be laid out and expended in or towards the foundation and building and furnishing of a substantial hospital for the city of G., and he directed that no part of the said trust moneys should be applied in purchasing land; and that in case no land or site should be granted or conveyed for the purposes aforesaid within ten years after his decease, then the trust moneys should sink into the residue of his estate. A grant of land was made shortly before the expiration of ten years from the testator's decease, as a site for the intended hospital, but the deed was not enrolled till five days after the expiration of the ten years:—

Held, that the grant was a sufficient compliance with the conditions prescribed by the testator; but that the bequest was void, as offering an inducement for putting land in mortmain. *Trye v. Corporation of Gloucester*, 73.

4. A bequest is void which tends directly to bring fresh land into mortmain; and a bequest of money to be expended in the erection or repair of buildings is also void, unless the testator in his will expressly states his intention that the money so bequeathed is to be expended upon some land already in mortmain. *Ib.*

5. *Construction of.*] A testator, by a codicil to his will, gave legacies of 500*l.* each to four children, by name, of his niece, Alice Early, the eldest daughter of his brother Henry, and he directed his executors to pay, out of his personal estate, the sum of 500*l.* apiece to each child that might be born to either of the children of either of his brothers, to be paid to each of them on his or her attaining the age of twenty-one years. The testator's niece, Alice Early, besides the four children named in the codicil, had three other children living at the date thereof:—

Held, that those children were not entitled to a legacy of 500*l.* each, as the words of the codicil contemplated only children who might be born subsequently to the date of it. *Early v. Middleton*, 86.

6. *Construction — Revocation.*] A testator, by his will, devised his real estate to A. and B. in fee, on certain trusts, and by a codicil appointed C. "to be a trustee and executor of his will in the place of A., whom he did not wish to act as executor:—"

Held, that the codicil acted as a revocation of the devise made to A. by the will. *Hough's Estate*, in re, 61.

See ACCUMULATION.

WINDING-UP ACTS.

1. *Provisional Committee-man — Authority.*] Provisional directors of a company took a lease of offices for the purposes of the company for a term, and the trustees executed the same. A subscribers' agreement was executed, but the company was subsequently dissolved. On the company being ordered to be wound up under the acts, a trustee claimed to be repaid rent he had paid since the dissolution of the company; but the court held, that, whatever the question between the directors might be, the company at large was not liable for the rent. *James*, ex parte, 95.

2. *Joint-stock Companies — Contributory.*] By the deed of settlement of a company, it was declared that no member should be liable after he ceased to be such; and that, after a transfer of his shares, he should not be liable for any previous obligations. The master, under an order for winding up the company, placed a transfer of shares on the list of contributories in respect of his shares up to the time of transfer; but, on appeal, his name was removed. *Croxson*, ex parte, 93.

3. *Allottee — Contributory.*] The prospectus of a railway company set forth that "Power is hereby given to the provisional committee-men to apply the funds received in payment of expenses of plans," &c. The scheme proved abortive. An allottee of shares was held not to be a contributory. *Hirschel*, ex parte, 101.

Common Law, Admiralty, &c.

☐ In this Index, the cases in the Ecclesiastical and Admiralty Courts are denoted by the abbreviations (EC.) and (AD.) All other cases are in the Common Law Courts.

ACKNOWLEDGMENT.

To defeat Statute of Limitations.]

See LIMITATIONS.

ACQUIESCENCE.

See COSTS.

ACTION.

1. *Contract for the Sale of Goods.]* When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract. *Cort v. The Ambergate, &c., Railway Co.*, 230.

2. *Damages for Non-acceptance—Measure of Damages.]* Declaration in covenant upon a contract under seal for railway chairs to be supplied by plaintiffs to defendants, an incorporated railway company, at certain times and in certain quantities, to be paid for after delivery. Averment, that plaintiffs were ready and willing to execute and perform the contract according to the conditions and stipulations; and that defendants had accepted and received a certain quantity of the chairs. Breach, that defendants refused to accept and receive the residue, and prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract. It appeared that plaintiffs would have gone on regularly making and delivering the chairs according to the contract, if they had not received a notice from defendants that they did not wish to have any more chairs, and would not accept any more. After receiving that notice, plaintiffs ceased to make any more:—

Held, that plaintiffs were entitled to a verdict on a plea traversing the allegation, that they were ready and willing to execute and perform the contract, although they never made and tendered the residue of the chairs. *Ib.*

Held, also, that plaintiffs were entitled to a verdict on a plea traversing that defendants refused to accept or receive the residue of the chairs, and that they prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract; because, first, the material part of the allegation was, that defendants refused to receive the residue of the chairs; and, secondly, assuming that the whole must be proved, plaintiffs might be prevented from completing the contract otherwise than by positive physical force, and defendants, though a corporation, might discharge plaintiffs from the performance of the contract otherwise than by instrument under seal. *Ib.*

Held, also, that, in estimating the damages, the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which defendants refused to accept. *Ib.*

3. *Breach of Warranty—Action, by whom maintainable.]* A tradesman who sells an

Common Law, Admiralty, &c.

article which he, at the time, believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, 562.

4. A declaration in case by a husband and wife stated that the defendant, who was the maker and seller of certain lamps called Holliday's lamps, sold to the husband one of these lamps, to be used by his wife and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that, in consequence of the insufficient materials with which it was constructed, it exploded and burnt her. At the trial, the jury found that the accident had been caused by the defective nature of the lamp; but that the defendant was ignorant of this unsoundness, and had sold the article in good faith:—

Held, that, the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Id.*

5. *Right of, for obstructing a Way.*]

See *WAY*.

ACTION ON THE CASE.

See *COMMON CARRIER*.

ADMINISTRATION.

Administration de Bonis with Will annexed — Substituted Legatee for Life.] A substituted legatee for life is entitled to letters of administration *de bonis* with the will annexed, in preference to a substituted legatee; but where there is a doubt whether, under the terms of the will, the person claiming as legatee for life is entitled as such, the grant will be made to the legatee whose interest is admitted. *Brown v. Nicholls*, (xc.) 599.

ADVOWSON.

1. *Quare Impedit — United Churches — Act of Union, Effect of.*] A declaration in *quare impedit*, for disturbing the plaintiffs' presentation to the Church of B. with D. and A., alleged that one S. H. was seized of a moiety of the advowson of the said church in gross as of fee, and was entitled to present to the same, every alternate turn, the other moiety and alternate right belonging to the Earl of B.; and being so seized, S. H. presented, in his proper turn, his clerk, who was admitted, instituted, and inducted; that, on his resignation, the Earl of B. presented the said S. H.; that S. H. died so seized of the said moiety, which thereupon became vested in the plaintiffs in right of the wife as heiress of S. H., who are entitled to present in the turn which was of S. H.

Plea — That the plaintiffs ought not to present, because S. H. was not seized *modo et forma*. By a special verdict, it was found that B. with D. was a parish and rectory, and A. a parish and vicarage, in the same county and diocese, being two miles and a half apart, and both above the annual value of 6*l.* In 1718, the bishop of the diocese, at the request and with the consent of R. G. and the Earl of B., then patrons of A. and B. with D. respectively, and of the joint incumbent of the two churches, duly made an act of union, by which the vicarage and Church of A., with its appurtenances, &c., was united and annexed to the rectory of B. with D.; and it was decreed that the united churches should be held and reputed as one benefice, and that one clerk, at the alternate presentation of the Earl of B. and R. G., should hold both as one benefice, under the name of the rector of B. with A. That, after this union, the representatives of R. G. and the Earl of B. respectively presented to the united churches on the first and second vacancies. That R. G., son and heir of the above R. G., in 1760, conveyed to S. H., in fee, "all that the perpetual advowson or alternate right of presentation of and to the vicarage of the parish church of A., and all other the advowsons, tenements, and hereditaments, and parts and shares of advowsons, &c., of him, the said R. G., situate and being in A." That the title of S. H. to the moiety of the Church of B. with D. and A. was derived in no other way than by the above deed. That the subsequent presen-

Common Law, Admiralty, &c.

tations, including those in the declaration, were made to the united benefice alternately by those claiming under R. G. and the Earl of B.; and that all the interest of R. G., if any, after the act of union, in the advowson of A., became vested in S. H., in the declaration mentioned:—

Held, first, that assuming the act of union to have the legal effect of converting the two advowsons into one, such as described in the declaration, such advowson did not pass under the specific or general terms of the deed of 1760. *Robinson v. Bristol*, 377.

2. *Disseizin by Usurpation.*] Secondly, that the presentation by S. H., as alleged in the declaration, was not conclusive in favor of the plaintiffs, inasmuch as usurpation, since the 7 Ann. c. 18, does not constitute a seizin, but only evidence of it; and the special verdict had negatived all title except by the deed of 1760. *Ib.*

3. *Quære*, whether the mere act of union by the bishop, at common law, has any legal effect on the rights and title of the patrons to their respective advowsons. *Ib.*

AFFIDAVIT.

Semble, that an affidavit sworn before the deemster of the Isle of Man is not receivable here without proof that the deemster has power to take affidavits. *Cross v. Cheshire*, 517.

See ARBITRATION.

AGREEMENT.

See STAMP.

ALIENATION.

See LANDLORD AND TENANT.

ALTERATION OF INSTRUMENTS.

See EVIDENCE.

AMENDMENT.

Adding Plaintiffs—Limitations, Statute of.] A firm carried on business as A., B., and C. At the time of an alleged debt being contracted, B. and C. were surviving, and an action was subsequently commenced in their names. For more than three years after issue joined, negotiations were pending for a reference, which ultimately went off, and notice of trial was then given. It was then discovered that, at the time of the debt being contracted, eight other persons were beneficially interested in the firm. The court allowed the writ and other proceedings to be amended, by adding the names of these persons, in order to avoid the effect of the Statute of Limitations. *Carne v. Malins*, 568.

See FRAUDS, STATUTE OF.

APPEAL.

Maintenance of Pauper—Order of Justices.] By sect. 80 of stat. 8 & 9 Vict. c. 126, any person who shall think himself aggrieved by any order or determination of justices under this act, other than orders adjudicating as to the settlement of any lunatic pauper, and providing for his maintenance, may, within four months after such order or determination made or given, appeal to the Quarter Sessions:—

Held, that no appeal lies against an order of two justices upon the treasurer of a county for the payment of the costs of the maintenance of a lunatic pauper who had been adjudged chargeable to the county under sect. 63. *Regina v. Wilson*, 209.

See COUNTY COURT APPEAL. COSTS.

APPEAL FROM COUNTY COURT.

See VERDICT.

ARBITRATION.

1. *Award—Effect of Agreement to refer.*] H. & M., being partners, had covered

Common Law, Admiralty, &c.

- wires with gutta percha for R., in pursuance of a contract. They afterwards assigned the partnership business to C. H., with power to him to take proceedings in their name for the recovery of debts due to them, to enforce existing contracts, and to deal in respect thereof as they themselves might have done. C. H., after the assignment, also covered wires for R., on his own account, and brought two actions against him, one in his own name, the other in the name of H. & M. It had then been agreed between C. H. and R. to refer both actions, and all matters in difference, as well between H. & M. and R. as between C. H. and R., to arbitration; whereupon an order of reference was drawn up, and an award had been made: —
- Held*, on motion to set aside the order of reference and the award, that the agreement to refer both actions did away with the formal objection, that the order of reference did not sufficiently make it appear that both causes had been referred; as also the objection to the substance of it, that there was no consent of H. & M. thereto.
2. *Finality.*] *Held*, that the award was not bad for want of finality in awarding a discontinuance of H. & M.'s action without determining the cause of action, as it appeared that the discontinuance had been entered before or at the time of making the order of reference, and that it was left to the arbitrator to decide whether the discontinuance should remain, and it was intended that he should not proceed further in that action. *Hancock v. Reede*, 368.
3. *Affidavits.*] *Semble*, where an objection is made to an award for want of finality, the affidavits should clearly point out what matters have been brought before the arbitrator and left by him undetermined: —
- Held*, also, that there had been no excess of jurisdiction in disposing of the claim of R. for deductions from H. & M., inasmuch as that claim arose out of the same contract with respect to which the order of reference was made. *Ib.*
4. *Matters in Difference.*] Where all differences between A. on the one side, and B. and C. on the other, are referred, the arbitrator may award as to differences which A. has with B. or C. severally, as well as those which he has with them jointly. *Adcock v. Wood*, 570.
5. *Payment to a third Party.*] A direction in an award that one party shall pay money to a stranger is good, if it does not appear impossible that such payment can be for the benefit of a party to the award. *Ib.*
6. *Pleading.*] A declaration in *assumpsit* upon an award, after stating that differences had arisen between the plaintiff, on the one part, and the defendant and one S. A., on the other, alleged that it was agreed between the plaintiff, the defendant, and S. A. mutually and reciprocally to refer the same differences to T. S. and W. I., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150*l.* 18*s.* 6*d.* to T. S., who should immediately pay it to the plaintiff.
- Plea — That T. S. and W. I. did not make their award concerning the matters in difference referred to them, *modo et forma*: —
- Held*, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. *Ib.*
- Held*, also, that the declaration was good in arrest of judgment, as it sufficiently appeared, first, that the arbitrator had power to award upon differences between A., on the one side, and B. and C. severally, on the other; and, secondly, that the direction to pay the money to the arbitrator was for the benefit of the plaintiff. *Ib.*
7. *Enlargement of Time — Name of Arbitrator — Uncertainty — Costs.*] A declaration stated that it was agreed between the plaintiff and the defendants that, in a certain event, Joseph H. should say, by his award, in writing, to be delivered "on or before the 30th of December next, or on some such ulterior day as the said Joseph H., by a memorandum in writing, under his hand, to be indorsed thereon," (omitting the words "shall appoint,") what, if any thing, shall be paid to S. K., and "that the said James H. took upon himself the burden of the reference," and enlarged the time, &c. The declaration then set out the award, which commenced thus: "To all to whom these presents shall come, I, Joseph H., of, &c., send greeting;" and further, "I, Joseph H., award the sum of 270*l.*, to be paid to S. K. by the defendants, and that a promissory note of S. K. and Mary A. K. shall be given up to be cancelled, on condition that S. K. or Mary A. K., or either of them, shall not, by any proceeding, seek to compel the defendant, or other the plaintiff in certain

Common Law, Admiralty, &c.

actions, to prosecute the said actions on the promissory note, or to pay costs thereon; also, on the condition that the plaintiff shall release the defendants from all actions as to the colliery; the deed of release, in case of difference, to be settled for both parties by *Henry V.* The arbitrator ordered, lastly, that the costs of the arbitration and award should be paid thus: "two third parts thereof by the defendants, and the remaining one third part thereof by the plaintiff. In witness whereof, I, Joseph H., have hereunto set," &c. First breach, non-payment of the sum of 270*l.*; second, that two third parts of the costs of the arbitration amounted to 500*l.*, and that the defendants had not paid two third parts of the costs:—

Held, that there was a sufficient power to enable the arbitrator to enlarge the time; that it sufficiently appeared by the declaration that the award was made by the same person to whom the submission was made; and that the first breach was good, and the second bad. *Kirk v. Unwin*, 477.

8. *Power of the Court to enlarge the Time for making an Award.*] By the 3 & 4 Will. 4, c. 42, s. 39, power is given to the court or a judge to enlarge the term for the making of an award by an arbitrator appointed by a rule of court, judge's order, order of *nisi prius*, or submission containing an agreement that the submission should be made a rule of court:—

Held, that such power of enlargement might be exercised after the arbitrator had made his award. *Brown v. Collyer*, 239.

Held, also, that a rule *nisi* for such enlargement, or for remitting the matters back to the arbitrator, or for entering judgment after the award, need not, in terms, be drawn up "upon reading the rule of court making the submission in the cause a rule of court," if it sufficiently appear by the affidavits that the submission has been made a rule of court. *Ib.*

9. 1 & 2 Vict. c. 110, s. 18—*Practice.*] All matters in difference in the cause were referred by a judge's order. The award, dated the 14th of January, 1851, directed the defendant to pay 100*l.* "to the plaintiff, or to S., his attorney." A rule *nisi* was obtained, before the expiration of the next term, for an order, under 1 & 2 Vict. c. 110, s. 18, upon the defendant to pay to the plaintiff, or to S., his attorney:—

Held, that the application was not too early, although the time for moving to set the award aside had not expired; and, per Maule, J., that so long as an award is subject to a motion in the nature of a motion in arrest of judgment, the court will not enforce it; otherwise, if it be subject only to a motion in the nature of a writ of error. *Hare v. Flety*, 433.

10. *Motion to enforce Award.*] *Held*, also, that the direction to pay to the plaintiff, or to S., his attorney, did not vitiate the award; and that, upon a rule in that form, under the 1 & 2 Vict. c. 110, s. 18, the plaintiff only, and not the attorney, could issue execution. *Ib.*

11. This court will follow the established practice of granting rules to pay pursuant to the award, in cases in which the court would grant an attachment, notwithstanding the doubt expressed in *Creswick v. Harrison*, 15 Jur. 108; s. c. 1 Eng. Rep. 384. *Ib.*

ASSIGNEES.

Of a Bankrupt.]

See STOPPAGE IN TRANSITU. DAMAGES.

ASSUMPSIT.

1. *Right to recover a Deposit.*] Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: "And there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children, who were minors, and they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children:—

Held, that neither the children of Mrs. C. nor the trustees had legal capacity to join

Common Law, Admiralty, &c.

in a conveyance, and, therefore, a purchaser was entitled to recover the deposit. *Moseley v. Hide*, 247.

2. *Sale of Real Estate — Construction of Conditions of Sale.*] One of the conditions of sale, subject to which certain copyhold estates were purchased, stipulated that the vendors should not be required to produce any deeds, instruments, or documents of title not in their possession; and all deeds of covenant for production, and attested, official, or other copies, or extracts of or from any deed, will, &c., whether recited or referred to in the abstract or not, which the purchaser should, subject to this condition, require for verifying the abstract, or for any other purpose, and all certificates, &c., required to prove any descent, fact, matter, or thing whatsoever, also all searches and inquiries for the purpose of ascertaining where such instruments or evidence were to be found, and all costs and expenses incidental thereto, should be respectively paid, made, searched for, and obtained by and at the expense of the purchaser requiring the same, and all expenses of examination and comparison of the abstract with the deeds, and of procuring the production of such deeds as the purchaser under this condition should have a right to require, should be exclusively borne and paid by the purchaser:—

Held, in an action to recover back the deposit paid upon the sale, that, under the above condition, the vendors were not bound to procure a covenant for the production of two deeds not in the possession of the vendor, but which were set out in the abstract of title delivered to the purchaser, and to which the vendors had procured access for the purpose of verifying the abstract. *Gabriel v. Smith*, 172.

3. *Partners — Money paid.*] A. & B. being partners, employed C. as their banker, who was also the private banker of B. A. having demanded of B. an explanation of a balance in the banker's hands against the firm, B. wrote him a letter, to say that that balance was his (the defendant's) own debt, and that the firm had nothing to do with it. Subsequent to this, B. gave the banker, for the balance, then reduced by some payments, a promissory note, signed with the name of the firm; and having afterwards become bankrupt, the banker sued A. on the note, and recovered:—
Held, that A. might sue B. for that amount in an action for money paid to his use. *Cross v. Cheshire*, 517.

4. *For Non-delivery of Goods.*]

See DAMAGES.

ATTESTATION.

See WARRANT OF ATTORNEY.

ATTORNEY.

1. *Misconduct.*] If an attorney, suspecting that his client is engaged in a systematic course of fraud and forgery, continues to act for him as if he were assisting to enforce just rights and give effect to genuine documents, he is guilty of gross misconduct, although not originally privy to the frauds, and although never informed of the manner in which the forged documents were obtained. *Barber*, in re, 338.

2. *Lien of.*]

See PRACTICE.

AWARD.

See ARBITRATION.

BAILMENT.

Liability of Innkeepers.]

See INNKEEPER.

BANKRUPTCY.

Withdrawal of Summons.]

See PLEADING. DAMAGES. INSOLVENCY.

BEQUEST.

See LEGACY.

Common Law, Admiralty, &c.

BILL OF EXCHANGE.

1. *Description of, in insolvent Schedule.]*

See INSOLVENT ACT. DAMAGES.

2. *May be discharged by Parol.]*

See PROMISSORY NOTE.

BILL OF LADING.

See STOPPAGE IN TRANSITU.

BISHOP.

Visitor of Grammar School.]

See MANDAMUS.

BOND.

1. *Bond to the Crown — Power of Disposition.]* A bond to the crown under the 33 Hen. 8, c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond. *Ellis v. Regina*, 438.

2. The giving such a bond is a voluntary act upon the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the crown. *Ib.*

3. Such bond is within the 33 Hen. 8, c. 39, though made payable to "the king, his heirs and successors," and, being a record, can be looked at by the court, although it be not set out in the pleadings. *Ib.*

BOUGHT AND SOLD NOTES.

Variance between them.]

See FRAUDS, STATUTE OF.

BROKER'S LAW.

Entry of Contract in his Books.]

See FRAUDS, STATUTE OF.

BUSINESS.

Meaning of, in a Will.]

See WILL.

CASES DOUBTED, DENIED, &c.

Neale v. Wyllie, 3 B. & C. 533, doubted. 490.

Robinson v. Lyall, 7 Price, 592, doubted. 473.

Samsun v. Bragginton, 1 Ves. 443, fully stated and commented upon. 412.

Young v. Cooper, 20 Law J. Rep. (N. S.) Exch. 136; s. c. 3 Eng. Rep. 540, explained. 566.

CERTIFICATE.

When not admissible as Evidence.]

See EVIDENCE.

CERTIORARI.

See COSTS.

COALS.

Custom to measure Coals — Right to weigh Coals by Statute.] In a special action on the case, the declaration alleged that the corporation of L. had, from time immemorial up to the 1st of January, 1836, by persons deputed and appointed by them, the sole and exclusive privilege of measuring, and from the 1st of January, 1836, of weighing, all coals imported into the port of L. It then set out a like right, at the pleasure of the corporation, to fix and determine a reasonable rate of payment for the labor of the coal meters, to be proportioned previous to the said 1st of January

Common Law, Admiralty, &c.

1836, to the measured quantity of the coals, and subsequent to that day to their weight, the payments being to be made by the coal owner, and to be for the use and benefit of the coal meter. It then averred that the corporation had deputed and appointed a reasonable number of coal meters, of whom the plaintiff was one. The pleas traversed the right of the corporation to weigh the coals and the appointment of the plaintiff as a coal meter. Evidence was given of a custom of measuring all coals imported into the port of L. before the 1st of January, 1836, and that after that date the corporation ordered that the coal meters should be paid a sum per ton on the coals weighed instead of per chaldron as before, and that, subsequent to the 1st of January, 1836, the coal meters had weighed the coals instead of measuring them. In proof of the plaintiff's appointment, an entry in the corporation books, stating that he was appointed a coal meter, was put in. The entry was in the form always made respecting the appointment of coal meters. There was no evidence of any appointment of the plaintiff under the seal of the corporation. The plaintiff had acted as a coal meter for many years:—

Held, that the right of the corporation, by custom, by means of their deputies, to measure all coals imported into the port, was not converted into a right to weigh them by the stat. 5 & 6 Will. 4, c. 63. *Smith v. Cartwright*, 528.

Held, also, that as the coal meter claimed fees for his own benefit by the custom, he was an officer, and not a mere servant, of the corporation; that the appointment, therefore, ought to have been under the seal of the corporation, no custom being alleged of appointing such an officer without deed. *Ib.*

COAL METER.

See COALS.

COMMISSIONERS.

Liability for Excess of Power.]

See TRESPASS.

COMMON CARRIER.

1. *Railway Company, Liability of — Carriage of Mails and Officers of Post Office.*] A declaration in case alleged that the mails from L. to T. were carried on the defendants' railway, pursuant to the provisions of the 1 & 2 Vict. c. 98. That the plaintiff was an officer of the post office, whom the defendants had been reasonably required by the postmaster general to take up and carry, and had taken up and were carrying as such officer, in and upon a carriage of the defendants, in which the said mails were being conveyed. That the plaintiff, as such officer, then was lawfully in and upon the said carriage, and that thereupon it became and was the duty of the defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff. Breach, that the defendants omitted and neglected to use due and proper care and skill, and so negligently and unskilfully conducted themselves in and about carrying and conveying the plaintiff, and in conducting, managing, and directing the said carriage, and the engine and other carriages, and the railway itself, that the said carriage sustained a violent concussion, and the plaintiff was thereby greatly injured and prevented from attending to his business, &c., (alleging special damage:)—

Held, upon demurrer, that a duty as alleged arose out of the obligation imposed upon the defendants by the 1 & 2 Vict. c. 98, and that the action was maintainable. *Collett v. London & North-western Railway Co.*, 305.

2. *Carrier, Liability of — Notice — 1 Will. 4, c. 68 — Place of receiving Goods.*] A carrier whose servant receives goods at any other place than his office, warehouse, or other receiving-house, where a notice pursuant to 1 Will. 4, c. 68, is affixed, is not within the protection of the statute, whatever the nature of the goods may be, although the requisite notice is affixed in the office where the goods are usually received by him; and, therefore, where goods so delivered are lost, the carrier is liable as a common carrier at common law. *Pollock, C. B., dissentiente. Hart v. Baxendale*, 468.

COMPENSATION.

For Injury to Land.]

See LANDS CLAUSES CONSOLIDATION ACT.

Common Law, Admiralty, &c.

CONDITIONAL DEVISE.

See WILL.

CONSENT RULE.

See ESTOPPEL.

CONTRACT.

1. *Damages for Breach of.*]

See DAMAGES.

2. *Construction of.*]

See ASSUMPSIT.

CONVICTION.

See COSTS.

COPYHOLD.

See HERIOT.

CORPORATION.

Validity of Appointment of Officers, not under Seal.]

See COALS.

COSTS.

1. *Costs of Mandamus to Sessions.*] The right to the costs of a *mandamus* to sessions to hear an appeal does not depend upon whether or not cause has been vexatiously shown against the rule for the writ, but whether cause has been unsuccessfully shown. *Regina v. Justices of Middlesex*, 267.
2. At the sessions, an objection was raised by the bench to the right of the appellants to be heard, and they accordingly refused to hear the appeal. Upon a motion for a *mandamus* to compel them to hear it, the respondents showed cause; but the rule was made absolute, and the appellants succeeded at the sessions:—
Held, upon an application by the appellants for the costs of the application for the *mandamus*, that they were entitled to have them from the respondents. *Ib.*
3. *Conviction — Appeal.*] By sect. 29 of stat. 9 Geo. 4, c. 61, where the judgment of any justice in or concerning the execution of that act shall be affirmed on appeal, the court to whom such appeal is made shall order the appellant to pay costs to the justice; and if he shall refuse or neglect forthwith to pay the same, it shall be lawful for the court to order that he be committed to jail until the same be paid. By sect. 27 of stat. 11 & 12 Vict. c. 43, if, upon appeal from any conviction or order, the Court of Quarter Sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and, if the same shall not be paid, any justice may enforce payment by warrant of distress; and, in default of distress, may commit the party for three months. Sect. 36 repealed all acts and parts of acts inconsistent with the provisions of that act:—
Held, that sect. 27 of stat. 11 & 12 Vict. c. 43, applied to all summary convictions and orders of justices, (except those specified in sect. 35,) and orders of Quarter Sessions made on appeal from them; and that sect. 29 of stat. 9 Geo. 4, c. 61, which was inconsistent with it, was repealed by it and by sect. 36. *Regina v. Hellier*, 253.
4. *Order to Pay — Acquiescence — Certiorari.*] A conviction of defendant under stat. 9 Geo. 4, c. 61, was affirmed on appeal at the October Quarter Sessions, 1850, and he was ordered to pay costs to the justices, amounting to 20*l.* In November, defendant paid 10*l.* on account. On the 8th of February, 1851, the justices removed the order into this court under sect. 18 of stat. 12 & 13 Vict. c. 45, for the purpose of enforcing payment of the residue. On the 21st of February, defendant applied to a judge at chambers to stay proceedings on the order, which was refused; and on the 1st of March, a writ of *fi. fa.* was issued upon the order. In Easter term, defendant obtained a rule for setting aside the order and the *fi. fa.*:—
Held, first, that there had not been acquiescence in the order, nor laches in objecting

Common Law, Admiralty, &c.

to it by defendant, inasmuch as by sect. 34 of stat. 9 Geo. 4, c. 61, he could not remove the order by *certiorari*. *Ib.*

Secondly, that the order being removed into this court for the purpose of being enforced, it was competent to defendant to object to the illegality of it, though he could not have removed it by *certiorari*; and the court made the rule absolute, and ordered the money levied under the *f. fa.* to be returned. *Ib.*

See LANDLORD AND TENANT. PRACTICE. ARBITRATION AND AWARD. LANDS CLAUSES CONSOLIDATION ACT.

COUNTY COURT.

See MANDAMUS. PROHIBITION. VERDICT.

COUNTY COURTS ACT.

See INSOLVENCY.

COUNTY COURT APPEAL.

1. *Determination in Point of Law.*] Where an appeal is made against the determination of a county court in point of law, the case stated for the opinion of the court of appeal should separate the facts and law. *Casley v. Furnell*, 397.

2. *In what Cases Appeal lies.*] Though questions as to fact, as well as of law, are in contest before the judge of the county court without a jury, an appeal will lie if the court of appeal can see from the facts of the case, as stated, that the judge, in order to arrive at his judgment, must have decided a question of law in a particular way. *Ib.*

Semble, that no appeal will lie if the decision of the county court judge can be supported by any view of the facts stated in the case, which does not render it necessary to conclude that he has determined the particular point of law in the way complained of as erroneous. *Ib.*

COVENANT.

See ASSUMPSIT. LANDLORD AND TENANT. INSURANCE. WASTE.

CUSTOM.

See COALS.

DAMAGES.

1. *Measure of — Non-delivery of Goods.*] A. contracted to deliver to B. certain quantities of iron, payment for which was to be by bills at specified dates, which were accepted by B., and dishonored at maturity. Afterwards B. became bankrupt, and his assignees sued A. for non-delivery of a portion of the iron:—

Held, that the assignees were entitled to recover only such damages as could have been recovered by B. at the time of his bankruptcy, namely, the difference between the contract and the market price of the iron. *Valpy v. Oakeley*, 168.

2. *Payment by Bill afterwards dishonored.*] Where, by a contract for delivery of goods, payment is to be made by bills which are dishonored before the goods are delivered, the parties are then placed in the same position as if the bills had never been given, or the contract had been to pay in ready money, and the vendee can recover only the difference between the contract price and market price of the goods. *Ib.*

3. *Contract for Sale of Goods — Measure of Damages.*] Declaration in covenant upon a contract under seal for railway chairs to be supplied by plaintiffs to defendants, an incorporated railway company, at certain times and in certain quantities, to be paid for after delivery. Averment, that plaintiffs were ready and willing to execute and perform the contract according to the conditions and stipulations; and that defendants had accepted and received a certain quantity of the chairs. Breach, that defendants refused to accept and receive the residue, and prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract. It appeared that plaintiffs would have gone on regularly making and delivering the chairs according to the contract, if they had not received

Common Law, Admiralty, &c.

a notice from defendants that they did not wish to have any more chairs, and would not accept any more. After receiving that notice, plaintiffs ceased to make any more :—

Held, that plaintiffs were entitled to a verdict on a plea traversing the allegation, that they were ready and willing to execute and perform the contract, although they never made and tendered the residue of the chairs. *Ib*.

Held, also, that plaintiffs were entitled to a verdict on a plea traversing that defendants refused to accept or receive the residue of the chairs, and that they prevented and discharged plaintiffs from supplying the residue, and from the further execution and performance of the contract ; because, first, the material part of the allegation was, that defendants refused to receive the residue of the chairs ; and, secondly, assuming that the whole must be proved, plaintiffs might be prevented from completing the contract otherwise than by positive physical force, and defendants, though a corporation, might discharge plaintiffs from the performance of the contract otherwise than by instrument under seal :—

Held, also, that in estimating the damages, the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which defendants refused to accept. *Ib*.

4. *Action for special Damages only.*]

See WAY.

DEAN AND CHAPTER.

Visitor of Grammar School.]

See MANDAMUS.

DEBT.

1. *For Penalty — When barred.*]

See LIMITATIONS.

2. *When maintainable.*]

See INSURANCE.

DECEIT.

See WARRANTY.

DECLARATIONS.

See EVIDENCE.

DEED POLL.

See INSURANCE.

DEPENDANT.

Presence of, on Motion for a new Trial.]

See PRACTICE.

DELIVERY.

See STOPPAGE IN TRANSITU.

DEMURRER.

See PLEADING. WAY.

DEPOSIT.

Right to recover.]

See ASSUMPSIT.

DETINUE.

See STOPPAGE IN TRANSITU.

DISCHARGE.

In Insolvency.]

See INSOLVENCY.

Common Law, Admiralty, &c.

DISSEIZIN.

See ADVOWSON.

DUTY.

On Legacy.]

See LEGACY DUTY.

EASEMENT.

Light — Enjoyment for Twenty Years — Parol Agreement — Payment of Rent for Lights.] If the occupier of a house pay rent under a parol agreement to the owner of the adjoining land for the liberty of keeping windows open looking upon the land, the occupier of the house will, after twenty years' enjoyment of the lights, acquire the right to such enjoyment, and the owner of the land cannot, after that period, obstruct such lights, as the payment of the rent is not an interruption of the enjoyment under the stat. 2 & 3 Will. 4, c. 71, s. 3. *The Plasterers Company v. The Parish Clerks Company*, 481.

EJECTMENT.

1. *Will, Construction of — Conditional Devise.*] A testator, after charging certain fee simple property in L. with an annuity, devised, subject thereto, "that provided my said son J. D. (his heir at law) shall, when requested by my son D. D., effectually convey and assure unto him, the said D. D., his heirs and assigns forever, free from all manner of incumbrances, all that messuage, &c., called C., in the parish of T., &c., then I give and devise all and singular the aforesaid messuages, &c., out of which the said annuity or rent charge is to be issuing as aforesaid unto him, the said J. D., his heirs and assigns forever; but if the said J. D. shall, when required as aforesaid, refuse to execute such a conveyance unto the said D. D. and his heirs, then I give and devise the said messuages, &c., so made liable to the payment of the said annuity, unto my said son D. D., his heirs and assigns forever."
- J. D. continued seized of both L. and C. until his death, C. being all the time let by him to a tenant from year to year, and at his death he devised all his property to his wife. D. D. never requested J. D. to convey C. to him; but after his death D. D. tendered a conveyance for execution to J. D.'s wife, which she refused to execute:—
- Held*, that D. D. could not maintain an action of ejectment for the recovery of the property in L. *Doe d. Davies v. Davies*, 301.
2. *Railway Company — Right to take Land.*] A special railway act contained the usual clauses giving the company powers for the compulsory purchase of lands; and, by sect. 158, the company were not, except by the consent of the owner, to enter upon any lands which were required for the purposes of the act, until they had paid or deposited in the Bank of England the purchase money or compensation agreed or awarded to be paid. In 1845, the lessor of the plaintiff permitted the company to enter upon certain land, and agreed to refer the amount of compensation to an arbitrator; and in 1847, the company entered, and continued in possession until 1849, when the lessor of the plaintiff demanded possession:—
- Held*, that such demand of possession did not make the company trespassers, and that ejectment could not be maintained against them. *Doe d. Hudson v. Leeds & Bradford Railway Co.*, 283.
3. *Agreement — Acknowledgment of Plaintiff's Title.*] Defendant, being in possession of premises, entered into an agreement for the purchase of them. The purchase not being completed, the vendor brought ejectment:—
- Held*, that the agreement was an acknowledgment by defendant that the title was in the vendor. *Doe d. Bourne v. Burton*, 325.
4. *Statute of Limitations.*] In 1823, J. E., being seized in fee of a house, mortgaged it for a term of five hundred years, of which the lessor of the plaintiff was the assignee, and the mortgagor had paid him interest until recently before the commencement of the action. J. E. had become entitled upon the death of his mother, who resided in the house until her death in 1821. Defendant, the sister of J. E., had resided with her, and continued in possession of the house after her death, and without payment of rent or acknowledgment of title:—

Common Law, Admiralty, &c.

Held, that an action by J. E. would be barred by stat. 3 & 4 Will. 4, c. 27; but that the right of the lessor of the plaintiff to bring ejectment was preserved by stat. 7 Will. 4, and 1 Vict. c. 28. *Doe d. Palmer v. Eyre*, 356.

5. *Person claiming under Mortgage.*] In 1821, N., being seized in fee of land, leased it to W. In 1822, W. mortgaged it for a term of years. In 1834, the mortgage was paid off, and the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the lessor of the plaintiff claimed:—

Held, that the lessor of the plaintiff was a person claiming under a mortgage within stat. 7 Will. 4, and 1 Vict. c. 28, and, therefore, might bring ejectment within twenty years after the mortgage was paid off, though after the expiration of twenty years from the payment of rent to the mortgagor, or acknowledgment of title in him by the tenant in possession. *Ib.*

6. In 1829, W. leased land to defendant for twenty-one years. Defendant applied to W. for leave to take in a piece of ground adjoining, but W. declined to give such leave, stating that other persons, to whom he had sold adjoining houses, had a right of way over it. Defendant, notwithstanding, enclosed and occupied it for twenty years, without payment of rent or acknowledgment of title:—

Held, that the piece of ground could not be considered as having been occupied by defendant as part of the demised premises in respect of which rent was paid, and, therefore, an action by W. would be barred by stat. 3 & 4 Will. 4, c. 27. *Ib.*

See ESTOPPEL.

ESTOPPEL.

Ejectment — Action for Mesne Profits — Consent Rule.] In an action for mesne profits, after judgment in ejectment for the lessor of the plaintiff, it appeared that the defendant had been made defendant in the ejectment, under sect. 13 of stat. 11 Geo. 2, c. 19, upon entering into the consent rule as mortgagee and landlord:—

Held, that defendant was concluded by the consent rule from denying that he was landlord. *Doe v. Challis*, 249.

EVIDENCE.

1. *Certificate.*] In a suit respecting a grant of administration to a deceased intestate, between the alleged widow and the brother, the widow pleaded, in proof of the marriage, a certificate of baptism of a child, as the lawful child of her and the deceased, written and signed by the officiating minister, since deceased, and attested by three persons, one of whom was alleged to be deceased, another to be in New South Wales, and the third was not accounted for. The certificate did not purport to be an extract from any register kept by public authority, or otherwise:—

Held, first, that such certificate could not be received. *Parlby v. Parlby*, (zc.) 593.

2. *Absence of Witness.*] Secondly, that the absence of the two surviving witnesses must be satisfactorily accounted for. *Ib.*

3. *Inspection and Copy of Documents.*] The 14 & 15 Vict. c. 99, s. 6, which empowers courts of common law to order inspection and copy of documents in possession of the opposite party in all cases where a discovery may be obtained in a court of equity at the instance of the party applying, has not taken away the jurisdiction possessed by those courts previous to that statute, to order the inspection and copy of documents in the hands of an adverse party. *Bluck v. Gompertz*, 524.

4. Where a plaintiff declared on a guaranty contained in a letter of the defendant, who swore that he never had a copy of it, that he verily believed that, if produced, it would establish his defence to the action, and that he was advised and believed it was necessary for his attorney to be informed of its true purport and effect, in order to prepare his defence:—

Held, that the defendant was entitled to an inspection and copy of this document, irrespective of the stat. 14 & 15 Vict. c. 99, s. 6. *Ib.*

5. *Interlineation — When presumed to be made.*] Where an alteration or interlineation appears upon the face of a will, the presumption is, that it was made after the

Common Law, Admiralty, &c.

execution of the will, and it lies upon the party setting up the will to give some evidence to rebut that presumption. *Doe d. Shallcross v. Palmer*, 155.

6. *Evidence to rebut Presumption.*] A holograph will appeared to have been altered by turning a devise of certain cottages to W. F. in fee into a limitation to him for life, with remainder in fee to A. P., who was nowhere else mentioned in the will. Declarations made by the testator before the will was executed that he intended to make provision by his will for A. P., but not specifying any particular property which he intended to leave to her, were offered in evidence, for the purpose of raising an inference that the limitation to A. P. was inserted before the will was executed:—

Held, that these declarations were admissible evidence for that purpose. *Ib.*

7. *Previous Declarations of Testator.*] *Semle*, that declarations made by a testator after the time when the will is executed that he had provided for a person whose name occurred on an interlineation would not, however, be evidence that the interlineation was made before execution. *Ib.*

8. *What is admissible under Plea of Not Guilty in Trover.*]

See TROVER. STAMP.

FINALITY.

Of Award.]

See ARBITRATION AND AWARD.

FINE.

See WASTE.

FIXTURES.

See POOR RATES.

FOREIGN AFFIDAVITS.

See AFFIDAVITS.

FORGERY.

See ATTORNEY.

FRAUDS, STATUTE OF.

1. *Broker's Law — Entry of Contract.*] Where there is an entry of the contract between buyer and seller, by a broker acting for both parties, in his book, signed by him, that entry is the binding contract between the parties, and a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, will not affect its validity. *Sivewright v. Archibald*, 286.

2. *Bought and sold Notes.*] Also, where the broker omits to enter and sign any contract in his book, and sends bought and sold notes to the buyer and seller respectively, if these agree they constitute a binding contract; but if there be any material variance between them, they are both nullities, and there is no binding contract; and,—

By Patteson, J. There is in that case no note or memorandum in writing of the bargain to satisfy the 17th section of the Statute of Frauds. *Ib.*

By Erle, J. The mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree. *Ib.*

Declaration, setting out a sold note of "500 tons Messrs. Dunlop's pig iron," signed by a broker, stated an agreement by defendant to purchase, and a breach of that agreement by not accepting the same. Plea—*Non assumpsit*. It appeared that the broker agreed with defendant that he was to be the purchaser of 500 tons of Dunlop's iron, and that their iron was Scotch; that the broker delivered to defendant a bought note, in which the iron bought was named Scotch iron, and to plaintiff a sold note, in which the iron sold was named Dunlop's iron. Upon an objection that there was no binding contract, because there was a material variance between

Common Law, Admiralty, &c.

the bought and sold notes, the judge allowed the declaration to be amended according to the terms of the bought note. Evidence was then given that defendant, after the day on which he ought to have performed the contract, authorized the broker to treat with plaintiff for a compromise, but without referring to the terms either of the bought or the sold note:—

Held, that the amendment in the declaration was properly made. *Ib.*

Held, also, by Lord Campbell, C. J., Patteson and Wightman, JJ., that, there being a material variance between the bought and sold notes, they did not constitute a binding contract; and that if there were a parol agreement, there being no sufficient memorandum of it in writing, the Statute of Frauds had not been complied with; and by Lord Campbell, C. J., and Wightman, J., that there was not sufficient evidence of the defendant having ratified the contract sent to him contained in the bought note. *Ib.*

By Erle, J., that there was sufficient evidence to warrant the jury in inferring that the substance of the contract was as alleged in the amended declaration, and as expressed in the bought note; and, therefore, either that note alone would be a sufficient memorandum of the bargain, signed by an agent, within the Statute of Frauds, or, if both notes were essential to the plaintiff's case, they did not substantially vary. *Ib.*

FRIENDLY SOCIETY.

Notice of Meeting — Requisition upon Officers.] The officers of a friendly society are bound under sect. 9 of stat. 10 Geo. 4, c. 56, to sign a notice to convene a general meeting of its members, upon a requisition for that purpose being duly made to them. (Erle J., dissenting.) *Regina v. Aldham, &c., Insurance Society*, 365.

GOODS SOLD.

Damages for Non-delivery.]

See DAMAGES.

GRAMMAR SCHOOL.

Removal of Master.]

See MANDAMUS.

GUTTA PERCHA.

See ARBITRATION AND AWARD.

HABEAS CORPUS.

To bring Prisoner before Justices.] An application for a *habeas corpus ad respondendum*, to take a prisoner, in custody on a charge of felony, before justices to answer to another charge of felony, must be made to a judge at chambers, and not to the court. *Regina v. Isaacs*, 185.

HERIOT.

Copyhold — Quitrent — Statute of Limitations.] In trover for a heriot, it was proved by entries in the court rolls of a manor that, down to the year 1804, the land in respect of which the heriot was claimed was freehold land, held of the lord by heriot, quitrent, relief, &c. On the death of a tenant, in 1804, a heriot was seized. In 1824, the next tenant died; but there was no entry of any seizure of a heriot on that occasion, or of any reason for the omission. In 1826, the present lord came into possession; and in 1847, upon the death of the next tenant, the heriot now claimed was seized. Since 1804, no quitrent or relief appeared to have been demanded or paid, nor any service of any kind rendered to the lord of the manor:—

Held, that the lord's right of action was not barred by sect. 2 of 3 & 4 Will. 4, c. 27, and that there was no ground for presuming that the tenure of the lands had been changed, or even that the heriot had been released by the lord. *Chichester v. Hall*, 340.

Semble, that the right to the quitrent was barred by the statute. *Ib.*

HIGHWAYS.

See WAYS.

Common Law, Admiralty, &c.

HOLOGRAPH.

See WILL.

HUSBAND AND WIFE.

When Wife is a proper Party to an Action.]

See WARRANTY.

HYPOTHECATION.

Of a Ship, by Master.]

See SHIPS AND SHIPPING.

INFANT.

Appearance sec. stat.] Where an appearance *sec. stat.* was entered for an infant defendant, the court, on application made more than four days after service of the notice of declaration, set aside the appearance and all subsequent proceedings *without costs*, the defendant undertaking to appear regularly by guardian within four days. *Leech v. Claburn*, 581.

See ASSUMPSIT.

INFRINGEMENT.

Of Patent.]

See PATENT.

INNKEEPER.

1. *Negligence of Plaintiff.]* In an action against an innkeeper for the loss of goods, if the jury find that the plaintiff was guilty of gross negligence, the innkeeper is relieved from his liability. *Armistead v. White*, 349.
2. Where the plaintiff had, on the evening of the night in which the theft was committed, and on several previous occasions, opened his driving box, and counted the bank notes kept in it, in the presence of persons in the commercial-room, and the box was so insecurely fastened that it might be opened without a key:—
Held, that the jury were warranted in finding the plaintiff guilty of gross negligence; though it was the custom of travellers to leave their driving boxes in the commercial-room during the night. *Id.*

INSOLVENT ACT.

1. *Schedule — Bills, Description of — Sufficiency of.]* Bills of exchange, drawn by the defendant in India, were purchased there for the plaintiff, Moses Symons, who resided in England, and were indorsed and transmitted to him in this country. The defendant afterwards petitioned the Insolvent Court in India, and in his schedule described the plaintiff's debt thus: "Creditor, A. M. Symons, for the following bills of exchange (describing them) drawn by us upon Messrs. R., L., & Co., in favor of Moses Symons." A person named A. M. Symons resided in Calcutta, but was not shown to be connected with the bills in question:—
Held, that the description in the schedule was insufficient within the meaning of the 11 Vict. c. 21, s. 5, sched. C., the Insolvent Act, (India,) and, therefore, that the defendant was still liable on the bills. *Symons v. May*, 541.
2. *Insolvent Act, 1 & 2 Vict. c. 110, s. 69, 75 — Discharge — Schedule.]* Where an insolvent, who had accepted and given to the payee a bill drawn on him by J. S., described the bill in his schedule as drawn by J. S., but did not name the payee or allege that the holder was unknown:—
Held, that the insolvent was not discharged as to the payee under the 75th section of the 1 & 2 Vict. c. 110; confirming *Pugh v. Hookham*, 2 Car. & P. 376; *Lambert v. Smith*, 394.
Semble, also, that the description in the schedule was not sufficient under the 69th section. *Id.*

INSOLVENCY.

Discharge by Insolvent Court.] The discharge by the Insolvent Court of a person

Common Law, Admiralty, &c.

against whom judgment for a debt has been obtained in a county court does not satisfy the judgment, and the judgment remaining "unsatisfied" within the meaning of the 98th section of the County Courts Act, (9 & 10 Vict. c. 95,) the party may be proceeded against by summons under that section, and may be committed by ' judge under the provisions of sect. 99. *Abley v. Dale*, 422.

See STATUTE OF LIMITATIONS. LANDLORD AND TENANT.

INSPECTION OF DOCUMENTS.

See EVIDENCE ACT.

INSURANCE.

1. *Insurable Interest.*] Where the master of a ship, having borrowed money for repairs, gave the lender bills on the owner of the ship and on the consignee of the cargo for the amount, and also an instrument by which he purported to hypothecate the vessel, &c., and stipulated that, in case the bills were not accepted or paid, the lenders might take possession, and sell, under process of the Admiralty Court, and in which it was agreed that the lender should forbear maritime interest, and that the advances were to be recoverable whether the vessel arrived at its port of destination or not:—

Held, that the instrument was void, and that the lender had no insurable interest. *Stainbank v. Fenning*, 412.

2. The case of *Samsun v. Bragginton*, 1 Ves. 443, fully stated and commented upon. *Ib.*

3. *Deed Poll — Absolute Covenant — Liability of incorporated Company.*] Debt to recover 300*l.* as for a total loss under a deed poll or policy of insurance, sealed with the common seal of the company, (the plaintiffs in error.) The declaration set out the policy, which, after reciting that the said M. Kearney had represented that he was interested in, or duly authorized, as owner, agent, or otherwise, to make the insurance thereafter mentioned with the said company, and had covenanted to pay a certain premium, stipulated, amongst other things, that it was agreed by, and on behalf of, the company, that the capital stock and funds of the said company should, according to the provisions of the deed of settlement of the said company, be subject and liable to make good, and should be applied to pay and make good, all such losses and damages as might happen to the subject matter of the said policy, in respect of the sum of 300*l.* insured, which insurance was thereby declared to be upon cargo, goods, or freight (valued at interest) of and in the good ship *Mary*, whereof Noonan (the other defendant in error) was master; that the capital stock and funds of the company should alone be liable, according to the deed of settlement, to make good all claims and demands whatsoever under or by virtue of the said policy, and that no shareholder of the company should be in any wise liable to any claims or demands, nor be charged by reason of the said policy beyond the amount of his shares in the capital stock of the company. It was then averred that the defendants (the plaintiffs in error) became insurers for 300*l.* upon the freight of the said vessel; that divers goods had been shipped on board the said vessel to be carried for freight, and that from thence until the happening of the loss the plaintiffs (the defendants in error) were interested in the freight of the goods so shipped.

Held, first, that there was an absolute covenant on the part of the company to pay the sum insured when a loss should happen, and that it was not necessary to aver in the declaration that the capital stock and funds were sufficient according to the deed of settlement; the want of funds being a matter to be pleaded, on the part of the company, if a defence at all. *Sunderland Marine Ins. Co. v. Kearney*, 312.

4. Secondly, that an action of debt was maintainable. *Ib.*
5. Thirdly, that Noonan was sufficiently designated in the deed poll as a party interested with whom the company contracted, to entitle him to join as a plaintiff in the action. *Ib.*

INTERLINEATION.

See EVIDENCE.

Common Law, Admiralty, &c.

JOINDER.

Of Plaintiff.]

See INSURANCE.

JOINDER OF ISSUE.

See PLEADING.

JUDGMENT.

1. *Setting aside.]*

See WARRANT OF ATTORNEY.

2. *When unsatisfied.]*

See INSOLVENCY.

JUS DISPONENDI.

See STOPPAGE IN TRANSITU.

JUSTIFICATION.

In Libel, Plea of.]

See LIBEL.

LACHES.

See COSTS. MANDAMUS.

LANDLORD AND TENANT.

1. *Covenant to indemnify — Rent — Repairs — Costs.]* B. & P., being the owners of an unexpired term of seventy-two years in certain premises, let them for twenty-one years to G., with the usual covenants for repairs, payment of rent, &c., and afterwards assigned the reversion to B. G. had previously assigned the remainder of the term of twenty-one years to the plaintiff, with a similar covenant of indemnity, who assigned it to the defendant, with a like covenant. B. brought an action in respect of rent due and want of repair against G., who suffered judgment by default, and afterwards brought an action against the plaintiff for the amount so paid by him and his costs. The plaintiff defended the action unsuccessfully, and became liable to pay G. the amount of the judgment by default, together with G.'s costs of that judgment, and also the costs of the action. The plaintiff then brought an action against the defendant before he had paid to G. the amount recovered by G.:—

Held, first, that the plaintiff was entitled to recover the amount of the rent, the repairs, and G.'s costs of the judgment by default, but not his own costs of defending the action brought against him by G. *Smith v. Howell*, 490.

2. Secondly, that the plaintiff was entitled to recover, although he had not paid G. at the commencement of the action. *Ib.*

3. Thirdly, that G. had taken the proper course in suffering judgment to go by default. *Ib.*

4. *Neale v. Wyllie*, 3 B. & C. 533, doubted. *Ib.*

5. *Tenancy at Will — Insolvency — Vesting Order — Notice.]* Where a party, having created a tenancy at will, afterwards becomes insolvent, the vesting order and notice thereof to the tenant at will operate as a determination of the tenancy. *Doe d. Davies v. Thomas*, 487.

6. But it seems that mere alienation by the lessor at will will not determine the tenancy, as to the tenant, until he has knowledge of the alienation. *Ib.*

See PLEADING.

LANDS CLAUSES CONSOLIDATION ACT.

Compensation — Jury — Costs — Sects. 38 and 51 incorporated in Sect. 68.] The 68th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, by which any party entitled to compensation in respect of lands taken or injuriously affected by the execution of works may give notice of his claim to the promoters, and the

Common Law, Admiralty, &c.

claimant may have the matter settled by a jury, incorporates all previous sections which are applicable, and among others the 38th, which requires the promoters to give notice of the amount of compensation they are willing to pay, before summoning the jury, and also the 51st, which gives the claimant the costs of the inquiry when he recovers more than the sum offered by the promoters. *Richardson v. South-eastern Railway Co.*, 426.
 Conflicting with *Railstone v. The York, Newcastle, and Berwick Railway Company*, 19 Law J. Rep. (N. S.) Q. B. 464.

LEASE.

See LANDLORD AND TENANT. WASTE.

LEGACY.

1. A residuary bequest is a legacy within the 9 & 10 Vict. c. 95, s. 65. *Pears v. Wilson*, 445.
2. A bequest of money may be a legacy within the meaning of that section, although payable through the intervention of a trustee. *Ib.*

LEGACY DUTY.

Discretion of Trustees to sell — Payment and Satisfaction of Legacy.] A. B., and C. his eldest son and heir apparent, by indenture dated the 9th of January, 1800, joined in conveying certain lands and hereditaments of A. B. to trustees, for a term of one hundred years, subject to certain trusts during the joint lives of A. B. and C., and with power of revocation, and with divers remainders over. By indenture of the 18th of May, 1814, reciting, *inter alia*, that A. B. was not possessed of sufficient personal estate to pay the debts he might owe and the legacies he might bequeath at his death, without the sale of his family pictures, &c., A. B. and C., after revoking the trusts of the deed of the 9th of January, 1800, appointed that the said lands, &c., should be held by certain trustees, in trust, to sell within six months after the death of A. B. so much as would raise a sum necessary for the payment of his debts and legacies, not exceeding 50,000*l.*, the same to be paid to his executors and applied in aid of his personal estate, (only certain portions of which personal estate were, by deed poll of the 18th of May, 1814, directed to be used prior to such 50,000*l.* being raised,) with a further trust to convey what should not be sold to C. for life, with certain remainders and limitations, and in default of such taking effect, with remainder, as to one undivided third to Lady S. and S., a daughter of A. B., for life, with remainders to her sons, in tail; and as to the two other undivided thirds to D. and E., two other daughters of A. B., severally, with divers remainders over. By will, dated the 25th of June, 1814, and several subsequent codicils, A. B. appointed M. and others executors, and bequeathed to them two sums of 10,000*l.*, in trust, for such purposes as, notwithstanding her coverture, Lady S. and S. should appoint, and, in default of appointment, to her separate use. C. died in the lifetime of A. B., without issue, and A. B. himself died the 25th of December, 1824, without altering his said will and codicils, and leaving Lady S. and S., D. and E., respectively married and surviving. The personal estate of A. B. was insufficient for the payment of his debts and legacies without part of the 50,000*l.* being raised. By virtue of common recoveries, the respective estates tail of the sons of Lady S. and S., C. D. and E., were barred; and by deed, dated the 11th of July, 1826, between all necessary parties, it was agreed that a partition of the estates mentioned in the deed of the 18th of May, 1814, should take place.

The partition was accordingly effected by deed of the 21st of July, 1826, and by indenture of the 20th of September, 1826, one undivided third part was settled to such uses as Lady S. and S., her husband, and her eldest son, J. F., &c., or the survivor of them, should appoint. By deed of January, 1827, between Lady S. and S., D. and E., and their respective husbands and other necessary parties, after reciting that a partition had taken place, and certain lands, &c., were allotted to Lady S. and S.; that the debts and legacies had been paid, except the two sums of 10,000*l.*, which were raisable by sale of so much of the estate as might be required, but that the parties had agreed that, instead of a sale taking place, each undivided third part should be charged with one third of such legacies; that certain sums had been paid to the executors of A. B., in part satisfaction of two of the respective third

Common Law, Admiralty, &c.

parts, it was witnessed that certain lands, specified in a schedule annexed to the deed marked A, were conveyed to the use of the executors of the will of A. B., for a term of one thousand years, and subject thereto to the uses declared by the indenture of the 20th of September, 1826, upon trust, to raise, by mortgage or sale, the sum of 14,166*l.* 13*s.* 4*d.*, being the amount left unpaid of the two legacies of 10,000*l.* to Lady S. and S. By deed, dated the 6th of February, 1827, Lady S. and S. appointed the sum of 5833*l.* 6*s.* 8*d.*, which had been received by the executors, as above mentioned, to her husband, and also the residue, in default of further appointment, and died on the 6th of October, 1834, without having made any such appointment, leaving her husband her surviving; but, prior to her death, the 14,166*l.* was, by further payments, reduced to 11,452*l.* 5*s.* 3*d.* By indenture, dated the 12th of August, 1836, made between Lord S. and S., and T. F., his eldest son, the lands, &c., comprised in the said schedule A were conveyed, subject to the said term of one thousand years, for securing the said sum of 11,452*l.* 5*s.* 3*d.* to the use of the said Lord S. and S. and T. F., and the survivor of them. On the 13th of November, 1844, Lord S. and S. died; whereupon the said son, T. F., became seized of the lands, &c., comprised in the deed of the 12th of August, 1836, and was entitled, as residuary legatee under the will of his father, to the said residue of the two legacies of 10,000*l.* By deed of the 10th of July, 1845, made between the surviving executors of A. B. and T. F., (then become Lord S. and S.,) the said term created by the deed of the 6th of January, 1827, was surrendered, and became merged in the inheritance, and Lord T. F. accepted the said merger in full satisfaction and discharge of the legacies of 10,000*l.* and 10,000*l.*, and the said residue was thereby satisfied and discharged:—

Held, that the legacy duty was payable by the executors of A. B. upon the whole 20,000*l.*, as so much of the 50,000*l.* as was required was personalty, and the transaction by which the term was merged amounted to a payment of the residue of the legacies. *Attorney General v. Melcalf*, 456.

LEGATEE.

Right to Administration.]

See ADMINISTRATION.

LIBEL.

Plea of Justification — Material Part.] In an action for libel, the declaration set out the whole of a long letter, in which the defendant imputed to the plaintiff improper conduct in various transactions which had taken place in reference to a ditch of the plaintiff's, alleged by the defendant to be a nuisance. The defendant pleaded "as to so much of the libel as related to, and charged the plaintiff with, the keeping of the nuisance," a plea which attempted to justify every sentence contained in the letter. The jury found that the plaintiff kept the ditch as a nuisance, but negatived the improper conduct imputed to the plaintiff in the letter:—

Held, that, upon this finding, the plaintiff was entitled to the verdict. *Biddulph v. Chamberlayne*, 347.

LICENSE.

By Implication.]

See WASTE.

LIEN.

Of Attorney.]

See PRACTICE.

LIGHT.

Right to.]

See EASEMENT.

LIMITATIONS, STATUTE OF.

1. *Amendment — Adding Plaintiffs.*] A firm carried on business as A., B., and C. At the time of an alleged debt being contracted, B. and C. were surviving, and an

Common Law, Admiralty, &c.

action was subsequently commenced in their names. For more than three years after issue joined, negotiations were pending for a reference, which ultimately went off, and notice of trial was then given. It was then discovered that at the time of the debt being contracted eight other persons were beneficially interested in the firm. The court allowed the writ and other proceedings to be amended, by adding the names of these persons, in order to avoid the effect of the Statute of Limitations. *Carne v. Malins*, 568.

2. *Debt for Penalty under a By-law.*] An action of debt for a penalty due under a by-law made by virtue of a charter is "an action of debt grounded upon a contract without specialty," and is barred by 21 Jac. 1, c. 16, s. 3, if not commenced within six years after the penalty becomes due. *Master Warden, &c., v. Loder*, 309.

3. *Part Payment—Insolvency.*] One of the three makers of a joint and separate promissory note, bearing interest, paid the interest for some years, and then took the benefit of the Insolvent Debtors Act, having previously inserted the note in his schedule as an existing debt:—

Held, that a subsequent payment, on account of the note made by the assignee of the insolvent, under the direction of the Insolvent Debtors Court, was insufficient to take the case out of the Statute of Limitations, 9 Geo. 4, c. 14, as against the other makers. *Davies v. Edwards*, 520.

4. *New Promise.*] The following letter was written by the defendant to the plaintiff, in respect of a debt more than six years due: "I am much surprised at receiving a letter from H. K., this morning, for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. was in town:—"

Held not sufficient, under stat. 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations. *Cawley v. Farnell*, 397.

5. *What is sufficient Payment or Acknowledgment.*]

See PROMISSORY NOTE. EJECTMENT. HERIOT.

LUNATIC PAUPER.

See APPEAL.

MAILS.

Carriage of.]

See COMMON CARRIER.

MAINTENANCE.

See APPEAL.

MANDAMUS.

1. *Railway Company—Duty to complete Road.*] A railway act, which received the royal assent on the 18th of June, 1846, enacted that the powers of the company for the compulsory purchase of lands for the purposes of the act should not be exercised after the expiration of three years, extended by a subsequent act to five years, and that the railways authorized by the act should be completed within five years, and on the expiration of such period the powers granted to the company for executing the same should cease to be exercised, except as to so much of such railways as should then be completed.

Shortly after the passing of the act, a portion of one of the branch lines had been set out, and the remainder in October, 1848; but no notice had been given to any land owner that his land would be required. At a meeting of the shareholders, it had been resolved that the directors should not commence the making of any branch line without the consent of a general meeting of the company. An application to the company to make the branch line in question was made in March last, and a rule for *mandamus* to the company to make and complete it was obtained in Easter term:—

Common Law, Admiralty, &c.

Held, that the land owners had not been guilty of laches in making the application, and that the company had not shown a want of power to obey the writ; and, therefore, the court made the rule absolute. *Regina v. The York, Newcastle, &c., Railway Co.*, 260.

2. So ruled also where, at a general meeting of the shareholders of the company, it had been resolved that the making of the branch line should be abandoned, and it was not shown by the affidavits on which the rule was obtained that the company had funds for completing the line. *Ib.*

3. *Costs of Mandamus to Sessions.*] The right to the costs of a *mandamus* to sessions to hear an appeal does not depend upon whether or not cause has been vexatiously shown against the rule for the writ, but whether cause has been unsuccessfully shown. *Regina v. The Justices of Middlesex*, 267.

4. At the sessions, an objection was raised by the bench to the right of the appellants to be heard, and they accordingly refused to hear the appeal. Upon a motion for a *mandamus* to compel them to hear it, the respondents showed cause; but the rule was made absolute, and the appellants succeeded at the sessions:—

Held, upon an application by the appellants for the costs of the application for the *mandamus*, that they were entitled to have them from the respondents. *Ib.*

5. *Grammar School — Removal of Master.*] *Mandamus* to the dean and chapter of R. to restore the prosecutor to the office of head master of the grammar school of the cathedral. Return, (after setting out the statutes of the founder of the cathedral church, by which the head master of the grammar school was to be elected by the dean and chapter, and the bishop was appointed visitor of the cathedral church,) that the prosecutor, having been removed from his office, had not appealed to the bishop. Plea, that the writing and publishing of a certain pamphlet was the cause of removal of the prosecutor from his office; that the bishop of R. was formerly the dean of W., and that the matters contained in the pamphlet, which relate to the improper application of the funds of the cathedral church of W., were written and published of and concerning the bishop of R. as former dean of W.; that the prosecutor wrote and published the pamphlet with the intention of attributing to the dean and chapter of W., while the said bishop of R. was dean of W., the same identical neglect and improper conduct with respect to the cathedral church of W., and in and about the application of the funds and endowments relating thereto, as are charged against the dean and chapter of R. with respect to the cathedral church of R., and in and about the misapplication of the funds and endowments relating thereto; that passages in the pamphlet were written and published with the intention of imputing to the bishop of R., as visitor of the cathedral church of R., a knowledge of the misapplication of the funds, in violation of the statutes of the said cathedral church, by the dean and chapter; and that the dean and chapter had declared, under their common seal, that they removed the prosecutor from his office in consequence of his having written and published, in the said pamphlet, passages untruly alleged to be libellous, and directed as well against the dean and canons of the cathedral church of R. as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches; that by reason of the premises, the bishop had such an interest in the cause of removal of the prosecutor as to disqualify him from acting as visitor.

By the 35th statute, “*De Corrigendis Excessibus*,” si quis minorum canonicorum, clericorum, aut aliorum ministrorum in levi culpa delinquerit arbitrio decani aut eo absente vice decani corrigatur; sin gravius fuerit delictum (si justum judicabitur) ab iisdem expellatur a quibus fuit admissus. The 38th statute, “*De Visitatione Ecclesiarum*,” by which the bishop was appointed visitor, contained the following clause: “*Omniaque faciat quæ ad visitatoris officium de jure pertinere denoscuntur.*”

Upon demurrer to the return:—

6. *Visitor.*] *Held*, first, that the 35th statute did not give the dean and chapter authority to act as visitor of the grammar school. *Regina v. Dean and Chapter of Rochester*, 269.

7. *Excess of Jurisdiction.*] Secondly, that, the bishop being constituted visitor of the grammar school by the 38th statute, the cause of removal of the prosecutor from

Common Law, Admiralty, &c.

his office was not an excess of jurisdiction by the dean and chapter which could be made the ground of a *mandamus*. *Ib.*

8. *Disqualification.*] Thirdly, that the bishop had not such a personal interest in the cause of removal of the prosecutor as disqualified him from acting as visitor. *Ib.*

9. *Compulsory Purchase of Land.*] *Mandamus*, tested the 22d of April, 1850, commanded a railway company immediately to purchase lands necessary for making, constructing, and completing a branch railway, and to make, construct, and complete the same, in pursuance of the provisions, powers, and authorities contained in the recited acts of Parliament. The special act, 9 and 10 Vict. c. 262, which received the royal assent on the 27th of July, 1846, enacted, by sect. 18, that the powers of the company for the compulsory purchase of lands for the purposes of that act should not be exercised after the expiration of three years; and by sect. 20, that the works thereby authorized should be completed within five years, and on the expiration of such period the powers granted to the company for executing the same should cease to be exercised, except as to so much of the same as should then be completed:—

Held, first, that the court ought not to have issued the writ, the power of the company for the compulsory purchase of lands having expired before it was applied for. *Regina v. The London and North-western Railway Co.*, 220.

10. Secondly, that the return was good, without showing an application to all the land owners, and a refusal by them. *Ib.*

11. *Quære*, whether there lay upon the company an obligation to make and complete the railway, which might have been enforced by *mandamus*; and whether want of funds for the purpose would be an answer. *Ib.*

12. *To the Judge of a County Court to hear and determine a Plaint.*] Where a judge of a county court has entered upon the hearing of a plaint, and, from the evidence adduced before him, has decided that he had no jurisdiction to adjudicate between the parties, a *mandamus* will not lie commanding him to hear and determine it, even although he may be wrong in point of law. *Milner*, ex parte, 371.

13. *Contra*, if, in a case in which he has jurisdiction, he refuses to hear it, upon the mistaken notion that he has no jurisdiction to do so in respect of some preliminary matter. *Ib.*

14. R. having projected a benefit society, alleging in his prospectus that it was intended to be a branch of another society, which held out peculiar advantages to its subscribers, M. was induced to become a member, and continued so from 1841 to 1849, the society being conducted according to a code of rules of its own, and not as a branch society. A resolution was then passed by some of the members, without the consent or knowledge of M., entirely changing the object of the society. M. withdrew, and brought an action in the county court for the recovery of his subscriptions. The judge, upon proof of these facts, decided that he had no jurisdiction to adjudicate between the parties, and nonsuited M.:—

Held, that a *mandamus* would not go commanding him to hear and determine the cause. *Ib.*

See WAY. RAILWAYS.

MARITIME RISK.

See SHIPS AND SHIPPING.

MASTER.

See SHIPS AND SHIPPING.

MEMORANDUM.

Within Statute of Frauds.]

See FRAUDS, STATUTE OF.

MESNE PROFITS.

Action for.]

See ESTOPPEL.

 Common Law, Admiralty, &c.

MISCONDUCT.

See ATTORNEY.

MISNOMER.

See ARBITRATION AND AWARD.

MONEY PAID.

See ASSUMPSIT.

MOTION.

For a new Trial.]

See PRACTICE.

NEGLIGENCE.

See INNKEEPER.

NEW TRIAL.

1. *Improper Reception of Evidence — Appeal in a Jury Case.]* A plaint for breach of covenant was tried by a jury in a county court, and a verdict found for the plaintiff. An appeal was brought upon the ground that the judge had improperly received certain evidence. The court expressing an opinion that the evidence had been improperly received, application was made on the part of the defendant to have judgment entered for him. The court held that, under the stat. 13 & 14 Vict. c. 61, s. 14, they had no power to set aside the verdict of the jury, and to direct judgment to be entered for the defendant, and that they could do no more than direct a new trial. *Jonas v. Adams*, 188.

2. *In a Criminal Case.]*

See PRACTICE.

NEW COMBINATION

See PATENT.

NON-DELIVERY.

Of Goods, Damages for.]

See DAMAGES.

NOT GUILTY.

Plea of, in Trover.]

See TROVER.

NOTICE.

Plea of Want of, when not a Defence.]

See PLEADING.

NUL TIEL RECORD.

See VARIANCE.

OFFICER.

Distinction between Officer and Servant.]

See COALS.

OPENING.

Of Railways.]

See RAILWAYS.

ORDER OF JUSTICES.

See APPEAL.

Common Law, Admiralty, &c.

ORDER OF POOR-LAW BOARD.

See POOR LAWS.

OUTLAWRY.

See VARIANCE.

PARTIES.

See INSURANCE. WARRANTY.

PARTNERSHIP.

See ARBITRATION AND AWARD. ASSUMPSIT.

PART PAYMENT.

Under Statute of Limitations.

See LIMITATIONS.

PATENT.

1. *New Combination.*] There may be a patent for a combination of old and new mechanism; and such patent will be infringed by using so much of the combination as is material; and it will not be less an infringement because the result is attained by the substitution of a mechanical equivalent. *Sellers v. Dickinson*, 544.
2. *Specification — Infringement.*] In the specification of a patent for "improvements in looms for weaving," the plaintiff declared that his improvements applied to that class of machinery called power looms, and consisted "in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." After describing the manner in which that was done in ordinary looms, the specification proceeded thus: "The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or sley striking against the 'frog,' (which is fixed to the framing.) In my improved arrangement the loom is stopped in the following manner: I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the 'swell,' but instead of its striking a stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre and throw a clutch box (which connects the main driving pulley to the driving shaft) out of gear, and allows the main driving pulley to revolve loosely upon the driving shaft, at the same time that a projection on the lever strikes against the 'spring handle' and shifts the strap; simultaneously with these two movements, the lower end of the vertical beam causes a break to be brought in contact with the fly wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving," and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the "clutch box" was not used, but instead of it the "stop-rod finger" acted on a loose piece or sliding frog; but instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms, by means of the action of the "clutch box" in combination with the action of the break, was new and useful; also that the plaintiff's arrangement of machinery for bringing the break into connection with the fly wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's:—
Held, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent. *Id.*

Common Law, Admiralty, &c.

3. *Combination of Things new and old — Imitation.*] Where a patent is granted for a combination of several things, some of which are old and some new, the question for the jury is whether, taking the specification altogether, that which is claimed as a whole is new; and the imitation by a chemical or mechanical equivalent of a part of the combination, which is both material and new, is an infringement. *Newton v. The Grand Junction Railway Co.*, 557.
4. *New Manufacture — Garancine.*] In the ordinary process of dyeing by means of madder, the coloring matter is obtained from fresh madder by the application of hot water. The refuse, after boiling, is called "spent madder." It had long been known to dyers that a portion of the coloring matter remained in the spent madder, but it was not known how to extract it, as it remained in combination with the plant. Recently it was discovered that, by means of acid and hot water, the pure coloring matter of madder, called "garancine," could be obtained from fresh madder, and that this process extracted all the coloring matter of the plant. The plaintiff obtained a patent for a new manufacture of garancine by applying the same process of acid and hot water to the spent madder. Since his invention, the spent madder, which was previously worthless, became valuable: —
Held, in an action for an infringement of the plaintiff's patent, that it was not a question of law for the judge, but of fact for the jury, whether the plaintiff's invention was a new manufacture of garancine. *Steiner v. Heald*, 536.

PAUPER.

See POOR LAWS.

PAYMENT.

See LEGACY DUTY.

PENAL ACTION.

See LIMITATIONS.

PLEADING.

1. *Bankruptcy — Withdrawal of Summons. Meaning of.*] The declaration stated that before, &c., one W. was indebted to the plaintiff in 236*l.* 14*s.*; that the plaintiff, according to the provisions of the Bankrupt Law Consolidation Act, 1849, had filed an affidavit in bankruptcy against W., and had caused a summons to be issued out of the Court of Bankruptcy, by which W. was required to appear before the said court, for the purpose of ascertaining whether he admitted the plaintiff's demand or had a good defence; and which summons was pending at the time of the defendant's promise, and capable of being enforced; that, in consideration that the plaintiff would withdraw the said summons out of the court, the defendants promised and guaranteed to pay the plaintiff the sum of 236*l.* 14*s.* Averment, that the plaintiff withdrew the summons out of the Court of Bankruptcy, of which the defendants had notice. Breach, non-payment of the 236*l.* 14*s.* Plea, that the defendants had not notice that the plaintiff had withdrawn the summons: —
Held, on general demurrer, that the words "withdraw the summons" meant the taking some step whereby W. might be exonerated from attending the court, which must be by making some communication to him on the part of the plaintiff; or that it meant the taking some step in the Court of Bankruptcy; in either of which cases notice was not necessary, and, therefore, that the plea was bad. *Alhusen v. Prest*, 576.
2. *Scire Facias — Stat. 7 & 8 Vict. c. 110.*] *Sci. fa.* under the 7 & 8 Vict. c. 110, s. 66, against a member of a completely registered joint-stock company, upon a judgment obtained against the company, the plaintiffs having failed, after due diligence, to obtain satisfaction by execution against the property and effects of the company. Pleas, first, that due diligence had not been used, concluding with a verification; secondly, that no rule or order had, before issuing the *sci. fa.*, been obtained of the court or a judge. Replication to the first plea, that due diligence was used, concluding to the country; and to the second plea, a demurrer: —
Held, upon this demurrer, and on demurrer to the replication, —
3. First, that the writ of *sci. fa.* was a proper remedy, in this case, for, that such writ

Common Law, Admiralty, &c.

- was, by implication, given by sect. 66 of the 7 & 8 Vict. c. 110, and that the implication was not abrogated by the cumulative remedy given in sect. 68. *Maroon v. Lund*, 319.
4. Secondly, that the second plea was bad. *Ib.*
 5. Thirdly, that the replication was sufficient, and, under the circumstances, properly concluded to the country. *Ib.*
 6. *Necessary Allegations.*] Declaration in *assumpsit*, upon an agreement between landlord and tenant, containing, among others, a stipulation that defendant should not sell hay or straw grown on the farm during the tenancy, without the written license of plaintiff, alleged a breach of that stipulation:—
Held, by Lord Campbell, C. J., and Patteson, J., not necessary to allege that the breach occurred during the continuance of the tenancy. Erie, J., dissenting. *Massey v. Goodall*, 326.
 7. *Joinder of Issue—Similiter.*] A rejoinder concluded to the country with an “&c.,” but no *similiter* was added:—
Held, that, as issue was not joined, the defendant was not entitled to judgment as in case of a nonsuit; and that the *similiter* would not be intended from the “&c.” *Knaggs v. Knaggs*, 338.
 8. The *similiter* would be intended from the “&c.” after verdict. *Ib.*
 9. *Upon an Award.*] A declaration in *assumpsit* upon an award, after stating that differences had arisen between the plaintiff, on the one part, and the defendant and one S. A., on the other, alleged that it was agreed between the plaintiff, the defendant, and S. A. mutually and reciprocally to refer the same differences to T. S. and W. I., who made their award concerning the said matters in difference, and awarded that the defendant should pay 15*l.* 18*s.* 6*d.* to T. S., who should immediately pay it to the plaintiff.
Plea—That T. S. and W. I. did not make their award concerning the matters in difference referred to them, *modo et forma*:—
Held, that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. *Adcock v. Wood*, 570.
Held, also, that the declaration was good in arrest of judgment, as it sufficiently appeared, first, that the arbitrator had power to award upon differences between A., on the one side, and B. and C. severally, on the other; and, secondly, that the direction to pay the money to the arbitrator was for the benefit of the plaintiff. *Ib.*
 10. *Stat. 34 Geo. 3, c. 78, s. 113—Violation of Act.*] Sect. 113 of stat. 34 Geo. 3, c. 78, which empowered a company to make and maintain a canal, enacted that it should be lawful for the owners of lands within twenty yards from the canal to make a communication between the water therein and any steam engine, by means of pipes, so constructed as to prevent leakage or waste of water, and to draw from the canal such quantities of water as should be sufficient to supply the engine with cold water for the sole purpose of condensing the steam used for working such engine: provided that the proprietor of such engine shall return to the canal an equal quantity of water to that taken, on the same day and on the same level, (inevitable waste by condensing excepted,) so that no obstruction shall arise therefrom to the said navigation: provided also, that such water so taken shall be applied to the working of the said engine, and to no other use or purpose, and that every person laying pipes into the canal for such purpose shall make good the bank thereof, and repair all damages: provided, nevertheless, that no person shall take any water for the use of any engine without giving one month's notice in writing to the company, in order that they may appoint a person to inspect the premises, and to take care that the pipe is of a proper strength and thickness, and is laid into the bank in a proper manner; and if any dispute shall arise between the company and any person who shall be desirous of taking water out of the canal for the purposes of any engine, or who shall be in the use of taking the same therefrom, such dispute shall be finally settled and determined by the commissioners appointed under the act. Sect. 23 of stat. 46 Geo. 3, c. 20, after reciting that the power of taking water for the condensing of steam in the engines near to the canal, granted by the former act, might be abused, and that it was expedient that the provision relating thereto should be explained and amended, empowered the servants of the company to enter into any

Common Law, Admiralty, &c.

building containing such steam engine, and examine whether the water was applied to any other purpose than that of condensing the steam of such engine.

Declaration in case alleged that a canal was made by plaintiffs in pursuance of stat. 34 Geo. 3, c. 78, and was maintained by them for the purposes in the act specified; and that defendant, the owner of a steam engine, had given the notice required by stat. 113, and had laid down pipes. Breach, that defendant, having drawn off from the canal large quantities of water by means of the pipes, used and applied the same for different purposes and uses than the condensing the steam used for working the said engine, contrary to the statute. Second breach, that defendant, by means of the pipes, drew off from the canal more water than sufficient to supply the engine with cold water for the sole purpose of condensing the steam used for working the engine, contrary to the statute, whereby the navigation of the canal was greatly impeded and obstructed:—

Held, first, that the declaration sufficiently showed that plaintiffs were entitled to sue for an injury to the canal. *King v. Rochdale Co.*, 241.

11. Secondly, that it was a violation of sect. 113 of stat. 34 Geo. 3, c. 78, as explained by sect. 23 of stat. 46 Geo. 3, c. 20, to use the water for any other purpose than the condensing the steam used for working the engine, although no more was taken than sufficient for the purpose of condensing steam; and, therefore, the first breach was properly assigned. *Ib.*

12. Thirdly, that it was unnecessary to allege that the navigation of the canal was obstructed. *Ib.*

13. Fourthly, that if it was necessary to prove special damage, it must be presumed after verdict. *Ib.*

14. Fifthly, that the concluding words of the proviso of sect. 113 of stat. 34 Geo. 3, c. 78, did not by necessary implication take away the jurisdiction of the superior courts. *Ib.*

15. 2 & 3 Will. 4, c. 71 — *Right of Way*.] In an action of trespass to land, the defendant pleaded two pleas, founded on the 2 & 3 Will. 4, c. 71, alleging enjoyment as of right of a way over the land in question for twenty and forty years respectively. In support of these pleas, general evidence was given of user of the right of way, commencing about forty-eight years before the commencement of the suit, and continuing until within about two years of that time, and that there had been no interruption by others:—

Held, that the plea was not proved, and that there was no evidence to go to the jury in support of it. *Lowe v. Carpenter*, 450.

16. *Quare*, whether such a plea is good which alleges the user of right to have been for twenty or forty years, as the case may be, preceding the commencement of the suit, without saying "next" preceding. *Ib.*

17. *Traverse — Too large*.] To a declaration on a covenant to repair, alleging that the defendant, during the term, to wit, on, &c., and thence hitherto, permitted the premises to be out of repair, the defendants pleaded that, during the said term, the defendant did not permit the said premises to be out of repair:—

Held, that the plea was too large a traverse, as it put the whole time in issue. *Aldis v. Mason*, 391.

See LIBEL. ADVOWSON. INSURANCE. STOPPAGE IN TRANSITU.

18. *Plea of Not Guilty in Trover*.]

See TROVER.

POOR LAWS.

Appointment of Officers — Regulations of Workhouse — Rescinding Regulations — Quashing Order.] An order of the poor-law board, directed to the directors of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, to the vestrymen of the said united parishes, and to the church-wardens and overseers of the poor of the said united parishes, contained, among others, the following regulations:—

Art. 1. The admission of paupers into the workhouse is to be by an order of the directors, or by an order signed by an overseer or assistant overseer.

Common Law, Admiralty, &c.

- Art. 2. No pauper is to be admitted under such order, if it bear date more than six days before he presents it at the workhouse.
- Art. 13. The directors are not to admit into the workhouse, or any ward of it, or retain therein, a larger number or a different class of paupers than that from time to time fixed by the poor-law board.
- Art. 25. The paupers are to be kept employed, and no pauper is to receive any compensation for his labor.
- Art. 64. The directors are to superintend the repairs and alterations of the workhouse.
- Art. 65. The government of the workhouse is to be exercised by them.
- Art. 66. The vestry-men of the joint vestry shall, whenever it may be requisite, or whenever a vacancy may occur, appoint to certain offices named, and also "such assistants and servants as they or the directors, with the consent of the poor-law board, may deem necessary for the efficient performance of the duties of any of the said offices."
- Art. 67. The officers are to perform such duties as may be required of them by the rules of the poor-law board, together with all such other duties, conformable with the nature of their offices, as the joint vestry or the directors may lawfully require them to perform. Provided, that the regulations of this order shall apply to officers appointed by the joint vestry or the directors, although such officer may have been appointed before this order came into force.
- Art. 83. Every officer appointed to or holding any office under this order, other than the medical officer of the workhouse, shall continue to hold the same until he die or resign, or be removed by the poor-law board, in conformity with the provisions of the law in that behalf.
- Art. 88. The directors may, at their discretion, suspend from the discharge of his or her duties any master, matron, schoolmaster, schoolmistress, or medical officer; and shall, in case of every such suspension, forthwith report the same, together with the cause thereof, to the poor-law board.
- The two united parishes were governed, as regards the relief of the poor, by a local act, 11 Geo. 4, c. 10. By sect. 51, the power of appointment, of suspension, and removal of the greater part of the officers named in art. 66, "together with such and so many other officers, agents, servants, and persons as they shall think proper," was placed in the vestry-men. The directors were a body whom, by sect. 63, the vestry-men were to elect annually; and by sect. 72, they were to exercise all the powers relating to the relief, maintenance, and employment of the poor which church-wardens and overseers of the poor are by law authorized to exercise. By sect. 80, the directors were empowered to cause persons received into the workhouse to be employed in any work, trade, or manufacture, "and out of the profits arising from any work which may be performed by such persons, such gratuities or rewards may be distributed to the industrious and skilful, according to the quantity and perfection of their work, as to the said directors shall appear proper." On making absolute a rule for a *certiorari* to remove the above order:—
1. Held, first, that even in respect of those parts of the order which related to the appointment of officers, the order was rightly directed to the vestry-men. *Regina v. The Poor-law Commissioners*, 190.
 2. Secondly, that arts. 66 and 88 substantially altered the machinery which the local act had erected for the administration of the law, by making the directors coördinate with the vestry-men in the appointment of officers, and by placing the whole discretion, as to suspension from the discharge of duties, in the first instance, with the directors; and, therefore, those articles were not within the power of the poor-law board. The poor-law board consented to rescind art. 65. *Ib.*
 3. Thirdly, that sect. 46 of stat. 4 & 5 Will. 4, c. 76, which empowers the poor-law commissioners to order the parish officers to appoint such paid officers as the commissioners shall think necessary, and "to direct the mode of the appointment, and determine the continuance in office or dismissal of such officers," applied to parishes which were under a local act, and, therefore, rendered valid arts. 67 and 83. *Ib.*
 4. Fourthly, that the other articles merely regulated or controlled the relief or management of the poor, or the government of the workhouse, or merely guided or controlled the vestry-men, and, therefore, were within the powers given to the poor-law board by sect. 15 of stat. 4 & 5 Will. 4, c. 76, though some of them conflicted with the provisions of the local act. *Ib.*

Common Law, Admiralty, &c.

- building containing such steam engine, and examine whether the water was applied to any other purpose than that of condensing the steam of such engine.
- Declaration in case alleged that a canal was made by plaintiffs in pursuance of stat. 34 Geo. 3, c. 78, and was maintained by them for the purposes in the act specified; and that defendant, the owner of a steam engine, had given the notice required by stat. 113, and had laid down pipes. Breach, that defendant, having drawn off from the canal large quantities of water by means of the pipes, used and applied the same for different purposes and uses than the condensing the steam used for working the said engine, contrary to the statute. Second breach, that defendant, by means of the pipes, drew off from the canal more water than sufficient to supply the engine with cold water for the sole purpose of condensing the steam used for working the engine, contrary to the statute, whereby the navigation of the canal was greatly impeded and obstructed:—
- Held*, first, that the declaration sufficiently showed that plaintiffs were entitled to sue for an injury to the canal. *King v. Rochdale Co.*, 241.
11. Secondly, that it was a violation of sect. 113 of stat. 34 Geo. 3, c. 78, as explained by sect. 23 of stat. 46 Geo. 3, c. 20, to use the water for any other purpose than the condensing the steam used for working the engine, although no more was taken than sufficient for the purpose of condensing steam; and, therefore, the first breach was properly assigned. *Ib.*
12. Thirdly, that it was unnecessary to allege that the navigation of the canal was obstructed. *Ib.*
13. Fourthly, that if it was necessary to prove special damage, it must be presumed after verdict. *Ib.*
14. Fifthly, that the concluding words of the proviso of sect. 113 of stat. 34 Geo. 3, c. 78, did not by necessary implication take away the jurisdiction of the superior courts. *Ib.*
15. 2 & 3 Will. 4, c. 71 — *Right of Way*.] In an action of trespass to land, the defendant pleaded two pleas, founded on the 2 & 3 Will. 4, c. 71, alleging enjoyment as of right of a way over the land in question for twenty and forty years respectively. In support of these pleas, general evidence was given of user of the right of way, commencing about forty-eight years before the commencement of the suit, and continuing until within about two years of that time, and that there had been no interruption by others:—
- Held*, that the plea was not proved, and that there was no evidence to go to the jury in support of it. *Lowe v. Carpenter*, 450.
16. *Quære*, whether such a plea is good which alleges the user of right to have been for twenty or forty years, as the case may be, preceding the commencement of the suit, without saying "next" preceding. *Ib.*
17. *Traverse — Too large*.] To a declaration on a covenant to repair, alleging that the defendant, during the term, to wit, on, &c., and thence hitherto, permitted the premises to be out of repair, the defendants pleaded that, during the said term, the defendant did not permit the said premises to be out of repair:—
- Held*, that the plea was too large a traverse, as it put the whole time in issue. *Aldis v. Mason*, 391.

See LIBEL. ADVOWSON. INSURANCE. STOPPAGE IN TRANSITU.

18. *Plea of Not Guilty in Trover*.]

See TROVER.

POOR LAWS.

Appointment of Officers — Regulations of Workhouse — Rescinding Regulations — Quashing Order.] An order of the poor-law board, directed to the directors of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, to the vestrymen of the said united parishes, and to the church-wardens and overseers of the poor of the said united parishes, contained, among others, the following regulations:—

- Art. 1. The admission of paupers into the workhouse is to be by an order of the directors, or by an order signed by an overseer or assistant overseer.

Common Law, Admiralty, &c.

Art. 2. No pauper is to be admitted under such order, if it bear date more than six days before he presents it at the workhouse.

Art. 13. The directors are not to admit into the workhouse, or any ward of it, or retain therein, a larger number or a different class of paupers than that from time to time fixed by the poor-law board.

Art. 25. The paupers are to be kept employed, and no pauper is to receive any compensation for his labor.

Art. 64. The directors are to superintend the repairs and alterations of the workhouse.

Art. 65. The government of the workhouse is to be exercised by them.

Art. 66. The vestry-men of the joint vestry shall, whenever it may be requisite, or whenever a vacancy may occur, appoint to certain offices named, and also "such assistants and servants as they or the directors, with the consent of the poor-law board, may deem necessary for the efficient performance of the duties of any of the said offices."

Art. 67. The officers are to perform such duties as may be required of them by the rules of the poor-law board, together with all such other duties, conformable with the nature of their offices, as the joint vestry or the directors may lawfully require them to perform. Provided, that the regulations of this order shall apply to officers appointed by the joint vestry or the directors, although such officer may have been appointed before this order came into force.

Art. 83. Every officer appointed to or holding any office under this order, other than the medical officer of the workhouse, shall continue to hold the same until he die or resign, or be removed by the poor-law board, in conformity with the provisions of the law in that behalf.

Art. 88. The directors may, at their discretion, suspend from the discharge of his or her duties any master, matron, schoolmaster, schoolmistress, or medical officer; and shall, in case of every such suspension, forthwith report the same, together with the cause thereof, to the poor-law board.

The two united parishes were governed, as regards the relief of the poor, by a local act, 11 Geo. 4, c. 10. By sect. 51, the power of appointment, of suspension, and removal of the greater part of the officers named in art. 66, "together with such and so many other officers, agents, servants, and persons as they shall think proper," was placed in the vestry-men. The directors were a body whom, by sect. 63, the vestry-men were to elect annually; and by sect. 72, they were to exercise all the powers relating to the relief, maintenance, and employment of the poor which church-wardens and overseers of the poor are by law authorized to exercise. By sect. 80, the directors were empowered to cause persons received into the workhouse to be employed in any work, trade, or manufacture, "and out of the profits arising from any work which may be performed by such persons, such gratuities or rewards may be distributed to the industrious and skilful, according to the quantity and perfection of their work, as to the said directors shall appear proper." On making absolute a rule for a *certiorari* to remove the above order:—

1. Held, first, that even in respect of those parts of the order which related to the appointment of officers, the order was rightly directed to the vestry-men. *Regina v. The Poor-law Commissioners*, 190.

2. Secondly, that arts. 66 and 88 substantially altered the machinery which the local act had erected for the administration of the law, by making the directors coördinate with the vestry-men in the appointment of officers, and by placing the whole discretion, as to suspension from the discharge of duties, in the first instance, with the directors; and, therefore, those articles were not within the power of the poor-law board. The poor-law board consented to rescind art. 65. *Ib.*

3. Thirdly, that sect. 46 of stat. 4 & 5 Will. 4, c. 76, which empowers the poor-law commissioners to order the parish officers to appoint such paid officers as the commissioners shall think necessary, and "to direct the mode of the appointment, and determine the continuance in office or dismissal of such officers," applied to parishes which were under a local act, and, therefore, rendered valid arts. 67 and 83. *Ib.*

4. Fourthly, that the other articles merely regulated or controlled the relief or management of the poor, or the government of the workhouse, or merely guided or controlled the vestry-men, and, therefore, were within the powers given to the poor-law board by sect. 15 of stat. 4 & 5 Will. 4, c. 76, though some of them conflicted with the provisions of the local act. *Ib.*

Common Law, Admiralty, &c.

5. After the rule for the *certiorari* was made absolute, but before the *certiorari* was served, the poor-law board issued an order rescinding so much of art. 66 as required the vestry to appoint such assistants and servants as the directors might deem necessary, and art. 88. A rule was subsequently obtained to quash the order:—
Held, first, that it was competent to the poor-law board to rescind the objectionable parts of the original order. *Ib.*
6. Secondly, that, the order being divisible, the court might quash part of it. *Ib.*

POOR RATES.

1. *Fixtures—Mechanical Apparatus.*] Chambers, being large vessels of sheet lead, were erected in the open air upon the premises of the appellants, who carried on chemical works, in the following manner: Walls of strong masonry were built for the foundation, and the inside was filled with sand to a level with the top of the walls. The chamber rested upon the sand, and was encompassed by a framework of wood, which was used for its support, and to which it was attached by leaden rivets. Pipes for conveying the gases and vapors into and out of the chamber were fixed into buildings which were part of the freehold, but they might be removed at pleasure without injuring the freehold. When the pipes were withdrawn, the chamber rested on the ground by its mere weight, and, if sufficient force were used, might be lifted from the soil without displacing any part of the freehold:—
Held, that the ratable value of the premises was increased by the use of the chambers, inasmuch as they were used as part of the fixed machinery of the works attached to the other buildings for the purpose of being so used, and necessarily so attached in the use of them; and the premises, if underlet, would fetch a higher rent with the chambers upon them than they would if the chambers were removed. *Regina v. Haslam*, 321.
2. *Quære*, whether the chambers were annexed to the freehold; and
Held, that whether they were or were not annexed to the freehold was a question of fact for the sessions. *Ib.*

POWER.

See WASTE.

PRACTICE.

1. *Motion for a New Trial in a Criminal Case.*] Where a defendant has been found guilty upon an indictment for an offence which does not subject him to corporal punishment, it is not necessary that he should be present in court in order to move for a new trial. *Regina v. Parkinson*, 352.
2. Where defendant had been found guilty upon an indictment for perjury, and sentenced to transportation, but he was not in custody under the sentence, a motion for a new trial cannot be made unless he is present in court. *Regina v. Caudwell*, 352.
3. *Semble*, by Lord Campbell, C. J., that where several defendants have been convicted upon an indictment, it is not necessary that all should be present in court in order to move for a new trial on behalf of one or more of them. *Ib.*
4. *Habeas Corpus to bring Prisoner before Justices.*] An application for a *habeas corpus ad respondendum*, to take a prisoner, in custody on a charge of felony, before justices to answer to another charge of felony, must be made to a judge at chambers, and not to the court. *Regina v. Isaacs*, 185.
5. *Witness.—Order for Examination of—Time of making.*] The general rule is, that an order for the examination of a witness under 1 Will. 4, c. 22, s. 4, will not be made until after issue joined in the cause, but the practice in that respect is not imperative, and the rule may be relaxed where a case of urgent necessity is made out. *Fynney v. Bensley*, 186.
6. Where the name of a corporation defendant is changed, pending an action, the alteration should be suggested on the record, and papers filed in the case should be entitled of the new name. *Hibblethwaite v. Leeds, &c., Railway Co.*, 523.
7. *Set-off of Costs—Attorney's Lien.*] A declaration contained three counts: on two counts issues in fact were found for the plaintiff; on the third, which was for a

Common Law, Admiralty, &c.

distinct cause of action, judgment on the demurrer had been given for the defendant:—

Held, that the defendant's costs of the demurrer must be deducted from the costs of the plaintiff; and that the defendant's attorney had no lien, the costs of the judgment on demurrer being interlocutory costs within the proviso of the 93d rule of Hilary term, 2 Will. 4. *Scott v. De Richebourg*, 374.

8. *Gregory v. The Duke of Brunswick*, 3 C. B. 481, distinguished. *Ib.*

9. *Of Court of Appeal.*]

See COUNTY COURT APPEAL. ARBITRATION AND AWARD.

PRESCRIPTION.

See EASEMENT.

PRESENTATION.

See ADVOWSON.

PRESUMPTION.

See EVIDENCE.

PROHIBITION.

1. *County Court.*] The 13 and 14 Vict. c. 61, s. 14, 16, does not take away the writ of prohibition in cases where the county court is acting without jurisdiction. *Pears v. Wilson*, 445.

2. *Quare*, whether prohibition lies to a county court after sentence where no defect appears on the face of the proceedings. *Ib.*

3. *Jurisdiction.*] When an objection is taken to the jurisdiction of the judge of a county court, he ought to enter it on the proceedings, in order that a superior court may see if there is ground for a prohibition. *Ib.*

PROMISSORY NOTE.

1. *Payment, Evidence of.*] First count on a promissory note of the defendant for 500*l.*, dated the 7th of December, 1845; second count on a similar note, dated the 20th of January, 1846, both payable on demand to J. Clark, the testator; third count, money lent; fourth count, account stated.

Pleas—To the first and second counts, first, payment; second, that after the making of the notes, and before demand of the principal or interest, and before any breach of the promises, J. Clark exonerated and discharged the defendant from payment of the notes; third, that after making the notes, it was agreed, between J. Clark and the defendant, that the latter should purchase, with his own money, a piece of paper marked with a 10*s.* receipt stamp, and should fill up and write on it thus: "Hull, February 16, 1846. Received of R. Dawber (the defendant) the sum of 1080*l.*, being the principal and interest on two notes, dated December, 1845, and January, 1846, in full of all demands;" that the defendant should suffer J. Clark to sign his name; and that such purchase of the paper and such writing out and filling up, and permitting J. Clark to sign it, should be accepted by J. Clark in full satisfaction and discharge of the said causes of action. Fourth plea, to the third and fourth counts, *non assumpsit*; fifth, to the same, payment; sixth, to the same, the Statute of Limitations; seventh, to the same, a plea similar to the third plea.

In 1835, J. Clark agreed to lend the defendant 1000*l.*, on receiving two promissory notes for 500*l.* each. The notes were given, and the interest thereupon regularly paid by the defendant to J. Clark, who, on receiving it, was in the habit of indorsing a memorandum on the back of the notes. The backs of the notes being at length entirely covered, J. Clark proposed that the notes should be cancelled and others substituted, which was accordingly done, and the notes in question given by the defendant. In February, 1846, J. Clark, expressing a wish to make the defendant a present of the 1000*l.*, directed him to buy a 10*s.* stamp, and draw out a receipt for 1000*l.*, and 80*l.* for interest, which having been done, and the receipt having been signed by Clark, no further interest was paid. J. Clark subsequently died, having

Common Law, Admiralty, &c.

previously bequeathed the notes in question to his executors, with certain directions as to the investment of the proceeds:—

Held, first, that the transaction did not amount to a payment of the notes. *Foster v. Dauber*, 496.

2. Secondly, that the third and seventh pleas were not supported. *Ib.*
3. *Discharge, Evidence of.*] Thirdly, that the second plea of discharge was proved; that a liability on a bill of exchange may be discharged by parol, whether between immediate or intermediate parties; and that the same rule applies to promissory notes; and, therefore, that the second plea was good on motion for judgment *non obstante veredicto*. *Ib.*
4. *Statute of Limitations — Acknowledgment — Promise.*] Lastly, that the giving of the receipt was not a part payment or acknowledgment of the debt, so as to take the case out of the Statute of Limitations; and that the renewal of the two notes in January, 1846, could not be considered as a promise so as to render the defendant liable by a new promise to pay the original notes. *Ib.*

PROPOSAL.

See STAMP.

QUARE IMPEDIT.

See ADVOWSON.

QUITRENT.

See HERIOT.

RAILWAYS.

1. *Stat. 9 & 10 Vict. c. 155, s. 73 — "Between," Meaning of — Mandamus.*] By sect. 73 of stat. 9 & 10 Vict. c. 155, for making a railway from Ambergate, through Nottingham, to Boston, and for enabling the railway company to purchase the Nottingham and Grantham Canals, it was enacted, that, "from and immediately after the opening of the railway between Ambergate and Grantham for public use," the railway company should purchase the shares in both canals.
The railway had been opened for public use between Grantham and Nottingham, but not between Nottingham and Ambergate. The part opened was that which competed with the Grantham Canal; the part unopened was that which would compete with the Nottingham Canal. In an action by the Grantham Canal Company against the railway company to recover the price of the shares in their canal:—
Held, that the railway had not been opened between Ambergate and Grantham for public use within the meaning of sect. 73. *Grantham Canal Co. v. Ambergate, &c., Railway Co.*, 328.
2. But upon an application by the Grantham Canal Company, the court issued a *mandamus* to the railway company to complete the railway between Ambergate and Grantham. *Ib.*
3. An application for a *mandamus* to a railway company to complete the railway may be made by a shareholder. *Ib.*

RAILWAYS CLAUSES CONSOLIDATION ACT.

See WAY.

RAILWAY COMPANY.

Liability for obstructing a Right of Way.]

See WAY. MANDAMUS.

RATES.

See POOR RATES.

RECOGNIZANCE.

See SCIRE FACIAS.

Common Law, Admiralty, &c.

REFERENCE.

Agreement to refer, Effect of.]

See ARBITRATION AND AWARD.

RENT.

See LANDLORD AND TENANT.

REPAIRS.

See LANDLORD AND TENANT.

REVOCATION.

See WILL.

ROAD.

See WAY.

SALE OF REAL ESTATE.

Conditions — Power to convey — Right to recover a Deposit.] Conditions of sale, after stating that the estate was by settlement limited to Mrs. C. for life, with remainder to trustees in trust to sell for the benefit of her children, proceeded as follows: "And there being three such children only, all of whom have attained the age of twenty-one, such children or their trustees shall, if required, join in the conveyance to the purchaser; but no objection to the title of the vendors shall be made on account of the sale taking place during the life of Mrs. C." Two of the children of Mrs. C. were married women, having children, who were minors, and they had settled their portion of the money to arise from the sale of the estate in trust for themselves for life, with remainder to their children:—

Held, that neither the children of Mrs. C. nor the trustees had legal capacity to join in a conveyance, and, therefore, a purchaser was entitled to recover the deposit. *Moseley v. Hide*, 247.

See ASSUMPSIT.

SALE.

See WARRANTY. FRAUDS, STATUTE OF.

SCHEDULE.

Sufficiency of, under Insolvent Act.]

See INSOLVENT ACT.

SCIRE FACIAS.

1. *Stat. 7 & 8 Vict. c. 110 — Pleading.]* *Sci. fa.*, under the 7 & 8 Vict. c. 110, s. 66, against a member of a completely registered joint-stock company, upon a judgment obtained against the company, the plaintiffs having failed, after due diligence, to obtain satisfaction by execution against the property and effects of the company. Pleas, first, that due diligence had not been used, concluding with a verification; secondly, that no rule or order had, before issuing the *sci. fa.*, been obtained of the court or a judge. Replication to the first plea, that due diligence was used, concluding to the country; and to the second plea, a demurrer:—

Held, upon this demurrer, and on demurrer to the replication,—

2. First, that the writ of *sci. fa.* was a proper remedy, in this case, for that such writ was, by implication, given by sect. 66 of the 7 & 8 Vict. c. 110, and that the implication was not abrogated by the cumulative remedy given in sect. 68. *Marson v. Lund*, 319.

3. Secondly, that the second plea was bad. *Ib.*

4. Thirdly, that the replication was sufficient, and, under the circumstances, properly concluded to the country. *Ib.*

Common Law, Admiralty, &c.

5. *Recognizance — Fiat of Attorney General.*] Writs of execution having been sued out without effect on a judgment against the publisher of a newspaper for libel, the court allowed a *sci. fa.* to issue on the recognizance of the sureties taken under the 60 Geo. 3, c. 9, and 1 Will. 4, c. 73, the attorney general's fiat having been first obtained. *Brunswick*, ex parte, 579.

SEAL.

See COALS.

SHAREHOLDER.

May apply for Mandamus.]

See RAILWAYS.

SHIP AND SHIPPING.

1. *Master — Hypothecation.*] The master of a ship has no authority to hypothecate the ship for money advanced for repairs, unless the payment of the money borrowed is made to depend upon the arrival of the ship; nor can he pledge the ship itself and the personal credit of the owners. *Stainbank v. Fenning*, 412.
2. *Form of Instrument — Maritime Risk — Insurable Interest.*] Where the master of a ship, having borrowed money for repairs, gave the lender bills on the owner of the ship and on the consignee of the cargo for the amount, and also an instrument by which he purported to hypothecate the vessel, &c., and stipulated that, in case the bills were not accepted or paid, the lenders might take possession, and sell, under process of the Admiralty Court, and in which it was agreed that the lender should forbear maritime interest, and that the advances were to be recoverable whether the vessel arrived at its port of destination or not:—
Held, that the instrument was void, and that the lender had no insurable interest. *Ib.*
3. The case of *Samsun v. Bragginton*, 1 Ves. 443, fully stated and commented upon. *Ib.*
4. *Master, Authority of, to pledge Credit of Owner.*] The authority of the master of a ship to pledge the credit of his owner is incident to his being employed to bring the ship to the end of its voyage; and to obtain things necessary for that purpose he may, in the absence of the owner, or any easy means of communicating with him, pledge his credit, or even borrow money in his name, where immediate payment for such necessary things is required; but he has no authority to borrow money to pay for work previously done. *Beldon v. Campbell*, 473.
5. Therefore, where a ship bound to Newcastle was towed into that port, no agreement having been previously made that the towage was to be paid for immediately, and the master, six days afterwards, borrowed money to pay the towage:—
Held, that the owner was not liable. *Ib.*
6. So, where repairs were being done to the ship after its arrival at Newcastle, and the owner was residing one day's post distance, and the master borrowed money to enable the shipwright to pay his workmen on Saturday, the owner was held not to be liable. *Ib.*
7. *Robinson v. Lyall*, 7 Price, 592, doubted. *Ib.*

SIMILITER.

See PLEADING.

SOLD NOTES.

See FRAUDS, STATUTE OF.

SPECIAL DAMAGE.

See WAY.

SPECIFICATION.

Of Patent.]

See PATENT.

Common Law, Admiralty, &c.

STAMP.

Agreement — Prospectus — Proposal.] In an action by a schoolmaster for a sum of money in lieu of three months' notice of the removal of the appellant's (the defendant's) sons from school, it appeared that the appellant's agent, having expressed a wish to place the appellant's sons under the respondent's (the plaintiff's) care, received from the latter a prospectus, which stated that the terms were sixty guineas per annum, and that three months' notice or payment was required previously to the removal of the pupil. The respondent, at the time of delivering the prospectus, agreed, verbally, that the boys should be charged for at the rate of fifty guineas per annum each. The boys were thereupon sent to the respondent's school, and were taken away without the stipulated notice:—

Held, that the prospectus was a proposal, and not an agreement, and that no stamp was necessary. *Clay v. Crofts*, 485.

STATUTES CITED AND EXPOUNDED.

52 Hen. 3, c. 23,	404
21 Jac. 1, c. 16, s. 3,	309
7 Ann. c. 18,	377
34 Geo. 3, c. 78, s. 113,	241
9 Geo. 4, c. 14,	520
10 Geo. 4, c. 56, s. 9,	365
9 Geo. 4, c. 61,	253
1 Will. 4, c. 22, s. 4,	186
1 Will. 4, c. 68,	468
2 & 3 Will. 4, c. 71,	450
3 & 4 Will. 4, c. 27,	340
3 & 4 Will. 4, c. 42, s. 39,	239
5 & 6 Will. 4, c. 63,	528
7 Will. 4,	356
1 Vict. c. 26, s. 20, 22,	584
1 Vict. c. 28,	356
1 & 2 Vict. c. 110, s. 9,	353
1 & 2 Vict. c. 110, s. 69, 75,	394
1 & 2 Vict. c. 110, s. 18,	433
1 & 2 Vict. c. 98,	305
7 & 8 Vict. c. 110,	319
8 & 9 Vict. c. 18,	426
8 & 9 Vict. c. 20,	214
8 & 9 Vict. c. 20, s. 55,	179
8 & 9 Vict. c. 126, s. 80,	209
9 & 10 Vict. c. 95, s. 98, 99,	422
9 & 10 Vict. c. 155, s. 73,	328
11 Vict. c. 21, s. 6,	541
11 & 12 Vict. c. 43,	253
13 & 14 Vict. c. 61, s. 14,	188
13 & 14 Vict. c. 61, s. 14, 16,	445
14 & 15 Vict. c. 99, s. 6,	524

STOPPAGE IN TRANSITU.

1. *Bill of Lading making Cargo deliverable to Consignor's Order — Delivery on Board Consignor's Vessel.*] B. & Co., merchants at Liverpool, sent orders to M. & Co., merchants at Charleston, to ship, on account of B. & Co., a cargo of cotton, on board a vessel of B. & Co.'s, which was sent to Charleston with an outward cargo, and also to receive the cotton. M. & Co. thereupon purchased cotton from time to time, and shipped it on board B. & Co.'s vessel. The master of the vessel executed to M. & Co. a bill of lading, which stated that the cotton was to be delivered at Liverpool, "to order, or to our assigns, paying for freight for the cotton nothing being owners' property." M. & Co. indorsed the bill of lading, "Deliver the within to the Bank of Liverpool, or order. M. & Co." Afterwards M. & Co. sent to B. & Co. an abstract invoice of the cotton, in which they stated that they had shipped the cotton on board the vessel, "by order, and for account and risk," of B.

Common Law, Admiralty, &c.

& Co., and addressed "to order;" and still later, they sent to B. & Co. a full invoice, stating that the cotton was shipped "by order and for account of B. & Co., and to them consigned." M. & Co., not having sufficient funds of B. & Co. to pay for the cargo of cotton, drew bills on B. & Co. for the amount, and wrote to B. & Co., informing them of the drawing of the bills, and desiring them to insure the cotton. M. & Co. sold the bills they had so drawn to the bank at Charleston, and delivered to the bank the bill of lading, so indorsed, as a security for the payment of the bills, which were ultimately dishonored, and taken up by M. & Co. B. & Co. became bankrupts before the arrival of the vessel. M. & Co., by means of their agent, on its arrival, put in a claim to the cargo. The assignees of B. & Co. brought detinue against M. & Co.'s agents, who pleaded that the bankrupts, B. & Co., were not possessed, and that the plaintiffs were not possessed, as assignees: — *Held*, that M. & Co. had never parted with the property in the cotton to B. & Co., notwithstanding the delivery on board the vessel of B. & Co., because M. & Co. had, at the time of the delivery, reserved to themselves a *jus disponendi*, and preserved their rights as unpaid vendors; which the captain acknowledged by signing the bill of lading, making the cotton deliverable to their order, or assigns, although, in executing such a bill of lading, the captain might have exceeded his authority. *Turner v. Trustees of Liverpool Docks*, 507.

2. *Pleading.*] *Held*, also, that M. & Co. did not, by transferring the bill of lading, as security, to the bank at Charleston, lose their property in the goods, so as to prevent their claiming them as against B. & Co., or their assignees, and that the defence might be raised under the plea of not possessed. *Ib.*

STREETS.

See *WAY*.

TAXES.

See *POOR RATES*.

TENANT AT WILL.

See *LANDLORD AND TENANT*.

TENDER.

See *DAMAGES*.

TRAVERSE.

See *PLEADING*.

TRESPASS.

Against Commissioners.] By one clause of a local improvement act, power was given to commissioners "to cause the present and future streets, &c., and other public places, to be paved, &c., and the ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner, as they should think fit." By other clauses, the commissioners were authorized to give notice to the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring them to pave and flag the same, and in case of their neglecting to do so, then the commissioners were empowered to pave and flag the same, and to recover the expenses from the owners or occupiers, and to declare streets so paved to be highways, and to take upon themselves the future paving of such streets; but no power was given in those sections to alter the level of the streets.

The commissioners had given the notice required by the latter sections with regard to a street which was built upon, but had never been paved or flagged; and upon the neglect of the owners or occupiers, proceeded to do the work themselves. Instead, however, of merely paving the street, they cut down a steep ascent, and greatly lowered the level of the street opposite the plaintiff's houses: —

Held, that they were not justified in so doing, and were liable in trespass. *Brown v. Clegg*, 334.

Common Law, Admiralty, &c.

TROVER.

Pleading — Not Guilty — Denial of Property.] In trover, the plea of not guilty admits the property of the plaintiff. Therefore evidence that the chattels had been given to the plaintiff by the defendants upon a certain condition, which had not been performed, and that the defendants retaken them, is not admissible under that plea.

Young v. Cooper, 20 Law J. Rep. (N. S.) Exch. 136; s. c. 3 Eng. Rep. 540, explained. *Jones v. Davies*, 566.

See HERIOT.

TRUSTEES.

Power of]

See ASSUMPSIT. LEGACY DUTY.

TURNPIKE.

Right to cross.]

See WAY.

USER.

See EJECTMENT.

USURPATION.

See ADVOWSON.

VARIANCE.

Outlawry — Judgment of Waiver.] In a writ of error brought to reverse a judgment of waiver against a woman, the judgment was called a judgment of outlawry:— *Held*, upon plea of *nil tiel record*, that this was a fatal variance, and that the defendant in error was entitled to judgment. *Burnell v. Phillips*, 467.

VISITOR.

Of Grammar School.]

See MANDAMUS.

WARRANT OF ATTORNEY.

Attesting Witness.] A warrant of attorney, prepared by a law stationer, according to the instructions of the defendant himself, was attested by an attorney introduced to the defendant by the plaintiff. The defendant had written and signed an authority to the attorney to act as his attorney on the signing and executing the warrant. The attorney was named in the warrant as having authority to enter up judgment thereon, and had subsequently done so, and issued execution upon the judgment:— *Held*, that the attestation was good. *Levinson v. Syer*, 353.

WARRANTY.

1. *Breach of.*] A tradesman who sells an article which he, at the time, believes to be sound, but which is actually unsound, is not liable for an injury subsequently sustained by a third person, not a party to the contract of sale, in consequence of such unsoundness. *Longmeid v. Holliday*, 562.

2. *Action, by whom maintainable.*] A declaration in case by a husband and wife stated that the defendant, who was the maker and seller of certain lamps called Holliday's lamps, sold to the husband one of these lamps, to be used by his wife, and himself in his shop, and fraudulently warranted that it was reasonably fit for that purpose; that the wife, confiding in that warranty, attempted to use it, but that, in consequence of the insufficient materials with which it was constructed, it exploded and burnt her. At the trial, the jury found that the accident had been caused by the defective nature of the lamp; but that the defendant was ignorant of this unsoundness, and had sold the article in good faith:—

Held, that the fraud on the part of the defendant having been negatived, the action was not maintainable by the wife, who was not a party to the contract. *Ib.*

Common Law, Admiralty, &c.

WASTE.

1. *Power — Lease — Fine or Foregift.*] Tenant for life, dispunishable for waste, had power to lease for twenty-one years certain ancient pasture land, which she afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium, or foregift being taken for the making thereof," and that "none of the lessees should be, by any clause or words therein contained, authorized to commit waste, or exempted from punishment for waste." In a lease, reciting this power, the tenant for life demised, on the 13th of December, 1845, the premises for twenty-one years from the 1st of July last, reserving a rent payable half yearly on the 1st of January and the 1st of July, the first payment to be made on the 1st of January, 1846. The lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system," introduced by the tenant for life:—

Held, first, that such reservation of rent did not amount to a fine, premium, or foregift. *Doe d. Hopkinson v. Ferrand*, 404.

2. *Exception — License by Implication.*] Secondly, that the exception in the covenant did not amount to a license or authority to the lessee to commit waste by carrying out the allotment system; and that, if any implication could be made so as to construe that exception as implying a permission to the lessee to do any thing, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as she had power to permit it, and not otherwise. *Ib.*

3. *Stat. Marlbridge*, 52 Hen. 3, c. 28.] *Seemle*, such an exception introduced into a covenant not to commit waste, even if it amounted to an implied authority to commit waste, is not a "special license had by writing of covenant," within the meaning of the Statute of Marlbridge, 52 Hen. 3, c. 28. *Ib.*

WAY.

1. *Right to cross Turnpike — Option of the Company as to the Manner of Crossing.*] By sect. 46 of stat. 8 & 9 Vict. c. 20, "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special act) either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge, of the height and width, and with the ascent or descent, by this or the special act in that behalf provided." *Regina v. The South-eastern Railway Co.*, 214.

Mandamus recited that the railway which defendants were empowered to make crossed, not on a level, a certain public highway, by means of a trench twenty feet deep and sixty-five feet wide, through and along which the line of the railway had been carried, and the permanent way thereof had been laid down, and the said public highway was thereby cut through and destroyed, and rendered wholly impassable for passengers and carriages; and that a reasonable time for defendants to cause the said public highway to be carried over the railway by means of a bridge, in the manner provided in stat. 8 & 9 Vict. c. 20, had elapsed; and commanded defendants to cause the said public highway to be carried over the railway by means of a bridge, in conformity with the regulations in that behalf, that is to say, [specifying the particulars in sect. 50]:—

Held, first, that it not being otherwise provided by the special act, defendants had, by sect. 46, an option to carry the highway over the railway, or the railway over the highway, by a bridge. *Ib.*

2. Secondly, that the option given by sect. 46 was not determined by defendants having cut through the highway by a deep trench, and laid down the permanent way of the railroad in the trench. *Ib.*

3. *Obstruction of Right of Way — Action in Respect of Special Damage only.*] Case, for the obstruction of a right of way as appurtenant to the messuage and dwelling-house of the plaintiff, by means whereof, as alleged in the second count of the declaration, the plaintiff could not have or enjoy his said way as he of right ought to have done, and otherwise might and would have done, and had been and was deprived of the use, benefit, and advantage of the same, to his damage.

Plea, justifying the obstruction complained of, for the purpose of making and con-

Common Law, Admiralty, &c.

structing a railway under the powers and provisions in the Great Northern Railway Act, 1846, by which the defendants were incorporated, and in the acts therewith incorporated.

Replication, that the way was a road within the meaning of the Railways Clauses Consolidation Act, 1845, that the defendants had rendered it impassable, and thereby interfered with the same within the meaning of that act, and that the defendants had not caused a sufficient road to be made instead of the road so interfered with:—

Held, on demurrer, that by the 6th and 55th sections of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, the remedy by action for an interference with a private right of way was taken away, except where special damage had been suffered, and, therefore, that the second count was bad. *Watkins v. The Great Northern Railway Co.*, 179.

See PLEADING. TRESPASS.

WILL.

1. *Interlineation* — *When presumed to be made.*] Where an alteration or interlineation appears upon the face of a will, the presumption is, that it was made after the execution of the will, and it lies upon the party setting up the will to give some evidence to rebut that presumption. *Doe d. Shallcross v. Palmer*, 155.

2. *Evidence to rebut Presumption.*] A holograph will appeared to have been altered by turning a devise of certain cottages to W. F. in fee into a limitation to him for life, with remainder in fee to A. P., who was nowhere else mentioned in the will. Declarations made by the testator before the will was executed that he intended to make provision by his will for A. P., but not specifying any particular property which he intended to leave to her, were offered in evidence, for the purpose of raising an inference that the limitation to A. P. was inserted before the will was executed:—
Held, that these declarations were admissible evidence for that purpose. *Ib.*

3. *Previous Declarations of Testator.*] *Semble*, that declarations made by a testator after the time when the will is executed, that he had provided for a person whose name occurred on an interlineation, would not, however, be evidence that the interlineation was made before execution. *Ib.*

4. A will may be duly executed, within 1 Vict. c. 26, s. 9, although the testator affix only his initials. *In the Goods of Savory*, (ex.) 583.

5. 1 Vict. c. 26, s. 20, 22 — *Revocation* — *Revival.*] A. D. left a will and four codicils. The first codicil substituted legacies of stock for money legacies; the second revoked the appointment of an executor and trustee, and named another person as executor and trustee in his place; the third gave legacies to the executors and trustees appointed by the will and second codicil; the fourth directed the sale, by the executors and trustees named in the will, of an estate devised by the will, and the investment of the proceeds, upon certain trusts, and ratified and confirmed the will in every respect, except as revoked and altered by the first codicil:—

Held, that the will and the first and fourth codicils only were entitled to probate. *In the Goods of Dendy*, (ex.) 584.

6. *Codicil* — *Probate* — *Revocation* — *Proof of Fraud.*] B. made her will, in which she gave T. a legacy of 500*l.*, and appointed him executor thereof, jointly with A. C. and L. C. By a codicil, B. revoked the appointment of A. C. and L. C. as executors, and appointed T. sole executor, and gave him 50*l.* for his trouble as such. The capacity of B. was admitted, and A. C. and L. C. prayed probate of the will, without the legacy of 500*l.*, and of the codicil, without the appointment of T. as sole executor and the legacy of 50*l.*, on the ground that the legacies and the appointment of T. were fraudulently inserted, without the knowledge of B. T. prayed probate of the will and codicil, with the legacies and appointment:—

Held, on the evidence, that B. was aware that the will and codicil contained the legacies and appointment of T. as sole executor; and probate decreed accordingly. *Cleason v. Teague*, (ex.) 586.

7. *Construction of* — *Word "Business."*] A testator devised to his wife "all my land and shop, stock in trade, business, and every thing that I have;" and after his wife's death, he "willed and bequeathed the business to his son, for his sole use and benefit; but with an earnest request to do all in his power to assist those of the testa-

Common Law, Admiralty, &c.

tor's children who might require it;" and "all the rest of his property which might remain after his wife's death he gave to his executors in trust for his daughter:" — *Held*, that the son did not take under the word "business" the land upon which the shop was built, in which the business was carried on. *Doe d. Page v. Page*, 346.

8. *Conditional Devise.*] A testator, after charging certain fee simple property in L. with an annuity, devised, subject thereto, "that provided my said son J. D. (his heir at law) shall, when requested by my son D. D., effectually convey and assure unto him, the said D. D., his heirs and assigns forever, free from all manner of incumbrances, all that messuage, &c., called C., in the parish of T., &c., then I give and devise all and singular the aforesaid messuages, &c., out of which the said annuity or rent charge is to be issuing as aforesaid unto him, the said J. D., his heirs and assigns, forever; but if the said J. D. shall, when required as aforesaid, refuse to execute such a conveyance unto the said D. D. and his heirs, then I give and devise the said messuages, &c., so made liable to the payment of the said annuity, unto my said son D. D., his heirs and assigns forever."

J. D. continued seized of both L. and C. until his death, C. being all the time let by him to a tenant from year to year, and at his death he devised all his property to his wife. D. D. never requested J. D. to convey C. to him; but after his death D. D. tendered a conveyance for execution to J. D.'s wife, which she refused to execute:—

Held, that D. D. could not maintain an action of ejectment for the recovery of the property in L. *Doe d. Davies v. Davies*, 301.

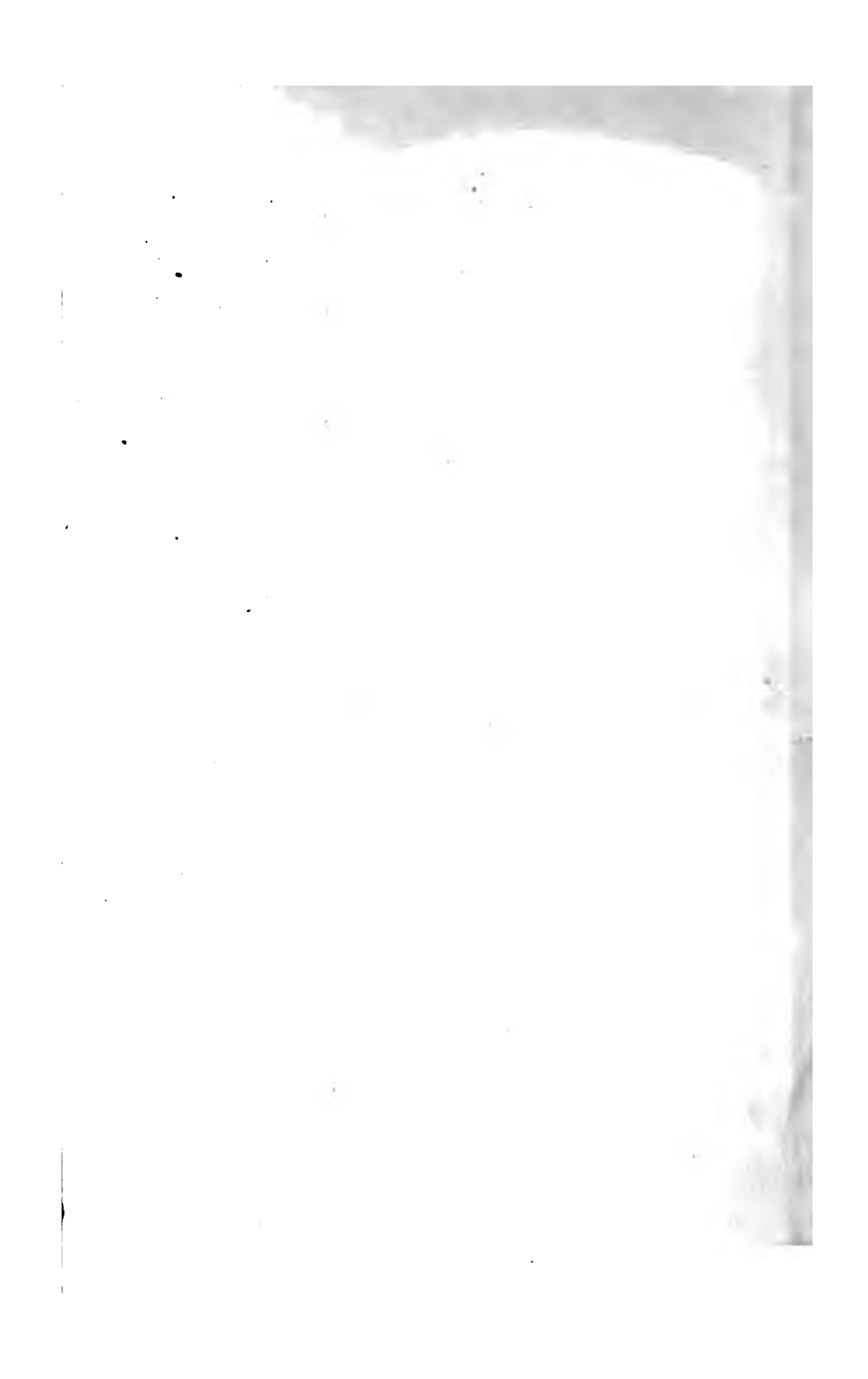
WITNESS.

Time of examining.]

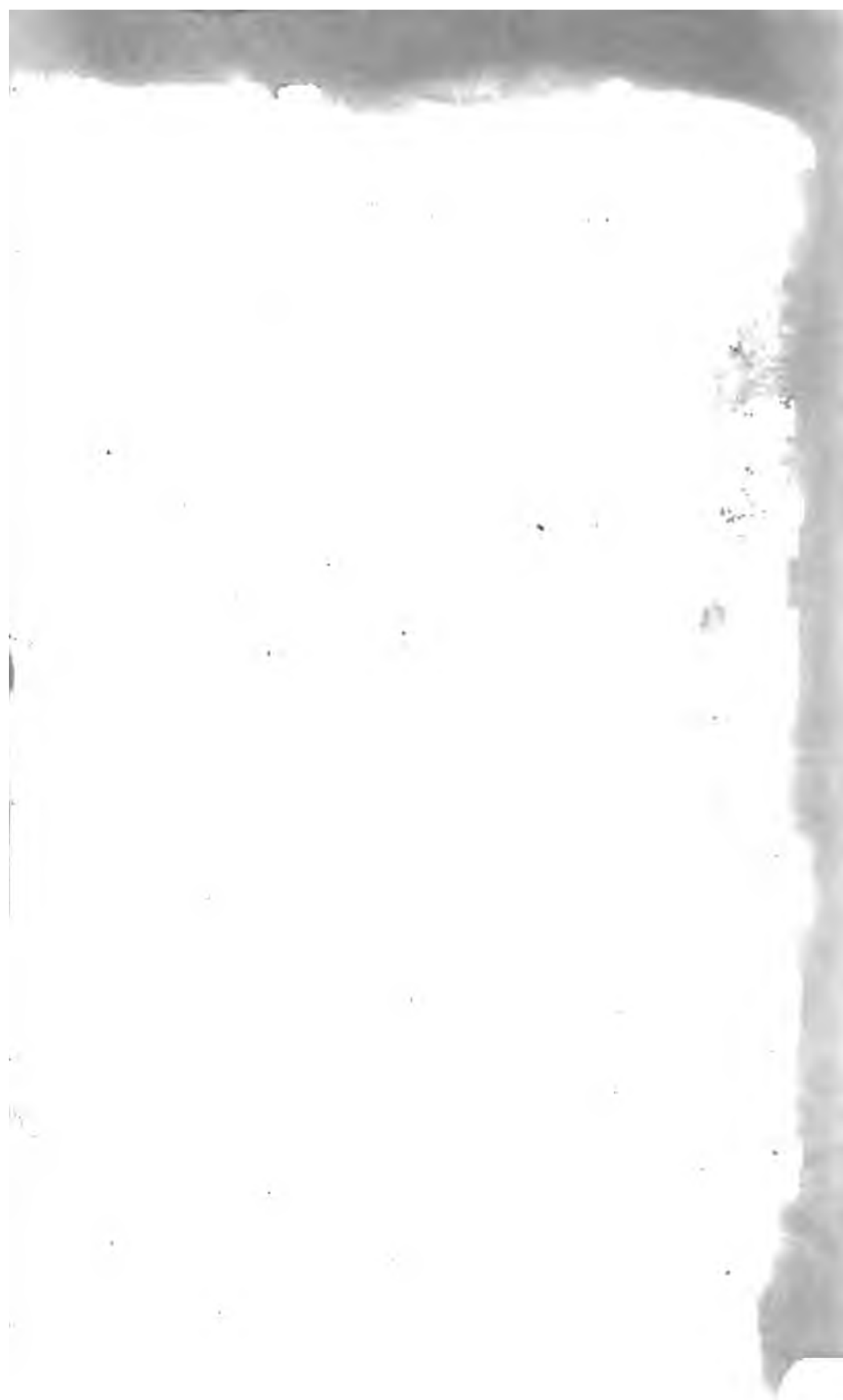
See PRACTICE.

WORKHOUSE.

See POOR LAWS.

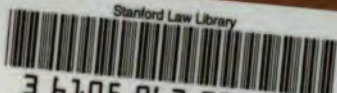








Stanford Law Library



3 6105 062 791 004

